DOCUMENT RESUME

ED 462 749 EA 031 561

TITLE	Advocacy Seminar 2001 Course Book (Alexandria, Virginia, October 25-27, 2001).
INSTITUTION	National School Boards Association, Alexandria, VA. Council of School Attorneys.
ISBN	ISBN-0-88364-250-6
PUB DATE	2001-10-00
NOTE	595p.
AVAILABLE FROM	National School Boards Association, Council of School Attorneys, 1680 Duke Street, Alexandria, VA 22314 ($200 nonmembers, $160 members). Tel: 800-706-6722 (Toll Free); Fax: 301-604-0158; Web site: http://www.nsba.org.
PUB TYPE	Collected Works - Proceedings (021) -- Guides - Classroom - Learner (051)
EDRS PRICE	EDRS Price MF03 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS	*Advocacy; Elementary Secondary Education; Legal Education (Professions); Public Schools; *School Law; *Seminars

ABSTRACT

This course book is a collection of reading materials (articles, memoranda, presentations) to be used in conjunction with seminars focusing on advocacy in education. There are 13 topics that include issues surrounding separation of church and state in the public-school environment; constitutional rights of secondary school students; special education; employment discrimination, including early retirement plans and the ADEA; the future of public education with regards to vouchers and school choice; Title I of the Elementary and Secondary Education Act of 1965; legal and policy challenges to high-stakes testing; Americans with Disabilities Act as it relates to the school environment; ethics and the school attorney; the Children's Internet Protection Act; and advising clients on effective student policies, focusing on due process/equity and zero tolerance. Other topics include federal issues and national trends, and what Supreme Court decisions do not necessarily communicate. Each topic is addressed by at least one document. (RT)

Reproductions supplied by EDRS are the best that can be made
from the original document.

ED 462 749

NSBA
COUNCIL
OF SCHOOL
ATTORNEYS

2001 Advocacy Seminar

Seminar Course Book
October 25-27, 2001
Hilton Alexandria Old Town
Alexandria, Virginia

·NSBA·

PERMISSION TO REPRODUCE AND
DISSEMINATE THIS MATERIAL IN
MICROFICHE ONLY HAS BEEN GRANTED BY

L. Andrews

TO THE EDUCATIONAL RESOURCES
INFORMATION CENTER (ERIC)

2B

Copyright© 2001
by the
National School Boards Association
Council of School Attorneys
1680 Duke Street
Alexandria, VA 22314
703/838-6722***FAX 703/683-7590
http://www.nsba.org/cosa

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION
CENTER (ERIC)

☑ This document has been reproduced as received from the person or organization originating it.

☐ Minor changes have been made to improve reproduction quality.

- Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.

EA031561

BEST COPY AVAILABLE

THIS PUBLICATION IS DESIGNED TO PROVIDE ACCURATE AND AUTHORITATIVE INFORMATION IN REGARD TO THE SUBJECT MATTER COVERED. IT IS SOLD WITH THE UNDERSTANDING THAT THE PUBLISHER IS NOT ENGAGED IN RENDERING LEGAL ACCOUNTING, OR PROFESSIONAL SERVICES. IF LEGAL ADVICE OR OTHER EXPERT ASSISTANCE IS REQUIRED, THE SERVICES OF A COMPETENT PROFESSIONAL SHOULD BE SOUGHT.

ISBN 0- 88364-250-6
Additional copies of this notebook, *2001 Advocacy Seminar,* can be obtained for $200 ($160 for NSBA Council of School Attorneys' members or NSBA National Affiliate School Districts) plus 7% shipping & handling. To order by phone, call 800/706-6722 or FAX your order to 301/604-0158.

NSBA Council of School Attorneys
2001 Advocacy Seminar
October 25-27
Hilton Alexandria Old Town, Alexandria, Virginia

Arthur L. Coleman is an attorney with the Washington, D.C, law firm of Nixon Peabody, LLP. He is an authority on issues relating to education reform and accountability issues, including high stakes testing; elementary, secondary and higher education admissions and financial aid issues. Mr. Coleman received his J.D., with honors, from Duke University.

Edwin C. Darden is senior staff attorney at the National School Boards Association's Office of General Counsel, Alexandria, VA. His work encompasses the full range of education law issues, including writing and collaborating on *amicus* briefs filed with the Supreme Court and federal courts. Mr. Darden received his J.D. from Georgetown University Law Center, Washington, D.C.

Lyle W. Denniston retired in February 2001 after many years as a legal reporter and correspondent, most recently as Supreme Court correspondent with the Washington Bureau of *The Boston Globe*. He has published extensively, and has spoken nationally on legal issues. Mr. Denniston received is MA with *honors* from Georgetown University, Washington, DC.

Marcus Egan is Director, Voucher Strategy Center at the National School Boards Association. The center's purpose is to focus on the specific issue of vouchers and assist state school boards associations in their efforts to defeat voucher legislation and initiatives. He received his B.A. from Villanova University.

Darryl L. Farrington is a partner with the Denver, CO law firm of Semple, Miller & Mooney, P.C., where he specializes in special education law, representing and advising over seventy school districts throughout Colorado. Mr. Farrington received his law degree from the University of Colorado.

Nancy Fredman Krent is a partner in the Arlington Heights, IL law firm of Hodges, Loizzi, Eisenhammer, Rodick & Kohn. She has taught public school law and is a frequent presenter for the NSBA Council of School attorneys. Ms. Krent received her J.D. *summa cum laude* from the University of Michigan Law School. She is vice chairman of the NSBA Council of School Attorneys.

Ned N. Julian is Executive Director for Legal Services and School Board Attorney for Seminole County Public Schools, Lake Mary, FL. He received his J.D. from Stetson University. Mr. Julian is a director of the NSBA Council of School Attorneys.

Michael J. Julka is an attorney with the Madison, WI law firm of Lathrop & Clark, LLP, where he is the current chair of the school, municipal, labor and employment law department. He received his J.D., *cum laude*, from the University of Wisconsin Law School. Mr. Julka is a past president of the Wisconsin School Attorneys Association.

D. Patrick Lacy, Jr. is a partner in the Richmond, VA law firm of Reed Smith, LLP with emphasis in civil rights and employment law, education law and health law. He has made numerous speeches and presentation relating to school law on the state and national levels. Mr. Lacy received his LL.B from the University of Richmond. He is a director of the NSBA Council of School Attorneys.

Cynthia Lutz Kelly is an attorney with the Kansas Association of School Boards, Topeka, KS. She is a frequent speaker and has authored and contributed to numerous NSBA Council of School Attorneys' publications. Ms. Kelly received her J.D. from the University of Kansas School of Law. She is Secretary/Treasurer of the Kansas School Attorneys' Association and Chairman of the NSBA Council of School Attorneys.

Julie Lewis is a staff attorney at the National School Boards Association's Office of General Counsel, Alexandria, VA. Prior to joining NSBA, Ms. Lewis was legal counsel and legislative specialist at the American Association of School Administrators. She graduated with honors from Northwestern University and Loyola University Chicago School of Law.

Barry W. Lynn is executive director of Americans United for Separation of Church and State, Washington, DC. He has appeared frequently on television and radio broadcasts to debate and discuss First Amendment issues. Mr. Lynn is an ordained minister who received his theology degree from Boston University School of Theology, and received his J.D. from Georgetown University Law Center.

Colby M. May is Director and Senior Counsel of the American Center for Law and Justice, Washington, DC. He has argued, participated in, or acted as counsel for *amici curiae* in several landmark cases, including *Santa Fe v. Doe* and *Boy Scouts of America v. Dale*. Mr. May has appeared on several national television programs, providing commentary on legal issues related to religious freedom, traditional family values and constitutional rights. He is a graduate of George Mason University School of Law.

James G. Middlebrooks is an attorney with the Charlotte, NC law firm of Smith, Helms, Mulliss & Moore, LLP.

Shamus P. O'Meara is a shareholder in the Minneapolis, MN law firm of Johnson & Condon, P.A., where he specializes in the construction, recovery, education and public law areas. Mr. O'Meara is a frequent speaker on construction, indoor air quality, recovery and employer liability topics. He received his J.D. from William Mitchell College of Law.

Scott Palmer is Counsel at Nixon Peabody, LLP, in Washington, DC, where he works on education and government relations matters. He formerly served as Deputy Assistant

Secretary of the US Department of Education's Office for Civil Rights. Mr. Palmer received his J.D. from the University of California, Berkeley, School of Law.

Thomas W. Pickrell serves as general counsel of Mesa Public Schools, Arizona's largest school district. He previously served as legal counsel for the Arizona School Boards Association. Mr. Pickrell received his J.D. from Duke University. He is a director of the NSBA Council of School Attorneys.

Michael A. Resnick is Associate Executive Director, Advocacy Issues Management at the National School Boards Association. He is responsible for the direction of the Association's advocacy and policy research programs, including congressional relations and monitoring key state legislative issues. Mr. Resnick received his J.D. from the George Washington University School of Law.

Kay E. Rigling is an attorney in the Office of General Counsel, U.S. Department of Education, Washington, D.C. She specializes in Title I issues. Ms. Rigling is a former special education teacher at the elementary school level. She received her J.D. from American University.

Stephen S. Russell is a shareholder with the York, PA law firm of Stock and Leader, PC. He served for 25 years as Chief Counsel for the Pennsylvania School Boards Association, and served as a consultant to school officials in education law and labor relations. Mr. Russell received his J.D. from the Dickinson School of Law. He is a director of the NSBA Council of School Attorneys.

Richard A. Schwartz is the lead attorney with the Raleigh, NC law firm of Schwartz & Shaw, PLLC. He currently serves as the Chairman of the Foundation Board for the North Carolina Center for the Advancement of Teaching. Mr. Schwartz received his J.D. from the University of North Carolina. He is past chairman of the North Carolina Council of School Attorneys and past director of the NSBA Council of School Attorneys.

Stuart Stuller is an attorney with the Boulder, CO, law firm of Caplan & Earnest, LLC., where his practice emphasizes school law, constitutional law, litigation and appellate practice. He has lectured on school law and constitutional issues at state and national conventions, and is a member of the adjunct faculty at the University of Colorado School of Law. Mr. Stuller received his J.D. from the University of Colorado.

Amy K. Tchao is a shareholder in the Portland, ME law firm of Drummond, Woodsum & MacMahon, where she has concentrated her school law practice on special education and disability rights law as well as other legal issues involving student rights. She received her J.D., *summa cum laude*, from the University of Maine School of Law.

Julie Underwood is general counsel of the National School Boards Association, Alexandria, VA. She is the former Dean of the School of Education and Allied Professions at Miami University, Ohio. Dr. Underwood received her Ph.D. from the University of Florida, and her J.D. from Indiana University.

Jay Worona is general counsel to the New York State School Boards Association. He successfully served as counsel of record for the Respondents in *Board of the Kiryas Joel Village v. Grumet*. Mr. Worona received his J.D. from Albany Law School of Union University, New York. He is a director of the NSBA Council of School Attorneys.

Deryl W. Wynn is a shareholder in the Kansas City, KS law firm of McAnany, Van Cleave and Phillips, where he specializes in labor/employment litigation and school law. Mr. Wynn received his J.D. from Washburn University School of Law with Dean's Honors. He is a director of the NSBA Council of School Attorneys.

NSBA Council of School Attorneys
2001 Advocacy Seminar
October 25-27, 2001
Hilton Alexandria Old Town, Alexandria, Virginia

TABLE OF CONTENTS

TAB A
Drawing the Line Separating Church and State in Our Public Schools

"Religion in the Public Schools," by **Colby M. May**, Director and Senior Counsel, American Center for Law and Justice, Washington, DC.

Barry W. Lynn, Executive Director, Americans United for Separation of Church and State, Washington, DC

> "The Legal Argument Against Private School Choice," by Steven K. Green. *University of Cincinnati Law Review*, Volume 62, No.1, Summer 1993
> "Prayer and the Public Schools: The Issue in Historical Perspective and Implications for Religious Education Today," by Boardman W. Kathan. *Religious Education*, Volume 84, Number 2, Spring 1989

TAB B
Constitutional Rights of Secondary School Students – A Changing Landscape

"Current Trends From the Courts," by **W. Stuart Stuller**, Caplan & Earnest, LLC, Boulder, CO

"Student First Amendment Rights in Elementary Schools – Is More Deference Afforded to School Authorities?" by **Stephen S. Russell**, Stock & Leader, PC, York, PA

TAB C
Current Issues in Special Education

"Coping with the 'Stay-Put' Rule When Educating the Dangerous Student," by **Darryl L. Farrington**, Semple, Miller & Mooney, PC, Denver, CO

> Guidelines for the Use of Non-Exclusionary and Exclusionary Time-Out, Colorado Department of Education
>
> Rules for the Administration of the Protection of Persons From Restraint Act, Colorado State Board of Education, 1 Colorado Code of Regulations 301-45, C.R.S. 26-20-108,C.R.S. 22-2-107(1)(a) and 22-2-107(1)(c) December 14, 2000

"Manifestation Determinations for Students with Disabilities After the 1997 IDEA Amendments: Does the New Standard Work?" by **Amy K. Tchao**, Drummond Woodsum & MacMahon, Portland, ME

TAB D

Current Issues in Employment Discrimination: Early Retirement Incentive Plans and the ADEA

"The Current Status of School Board 11th Amendment Immunity," by **Ned Julian**, Seminole County Public Schools, Sanford, FL

"The Wisconsin Experience," by **Michael J. Julka**, Lathrop & Clark, LLP, Madison, WI

Attachment 1. U.S. EEOC, Milwaukee District Office, Compliance Status Letter, July, 26, 2000 and Questionaire
Attachment 2. EEOC Notice of Charge of Discrimination
Attachment 3. U.S. EEOC, Milwaukee District Office, Determination dated December 6, 2000
Attachment 4. U.S. EEOC, Milwaukee District Office, Conciliation Agreement and Notice to All Employers
Attachment 5. U.S. EEOC, Milwaukee District Office, Age Discrimination in Employment Act (ADEA) letter April 27, 2001 Conciliation Agreement, and Early Retirement/Severance Benefits Information Sheet
Attachment 6. Resignation Agreement and General Release
Attachment 7. U.S. EEOC, Milwaukee District Office, unsuccessful to conciliate letter, July 5, 2001
Attachment 8. U.S. EEOC, Milwaukee District Office, conciliation if compliance with law relating to cash-based early retirement incentives letter, July 30, 2001
Attachment 9. U.S. EEOC, Milwaukee District Office, conciliation if compliance with law relating to cash-based early retirement incentives letter, July 9, 2001
Attachment 10. H.R. 2558. To amend the Age Discrimination in Employment Act of 1967 with respect to voluntary early retirement benefits and medical benefits

"Current Issues in Employment Discrimination: Early Retirement Plans and the ADEA," by **Shamus P. O'Meara** and Mark R. Azman, Johnson & Condon, PA, Minneapolis, MN

Minnesota's Legislative History of Early Retirement Benefits
EEOC Enforcement of the ADEA against School Districts
MSBAIT vs. EEOC and Education Minnesota
Current and Proposed Legislation
Current EEOC Enforcement Posture

Exhibit A. 2042 RHK/RLE Second Amended Complaint for Declaratory and Injunctive Relief and Jury Trial Demand. Minnesota School Boards Association Insurance Trust and Independent School District 94, Cloquet v. U.S. EEOC, Education Minnesota, and Education Minnesota, Cloquet.
Exhibit B. Chapter 159-S.F.No. 1614
Exhibit C. H.R. 2558, July 18, 2001
U.S. EEOC, Wahington, DC, letter August 22, 2001 reviewing policy on ADEA
EEOC Directives Transmittal 915.003, 8/20/01 on Rescission of Section IV (B) of EEOC Compliance Manual Chapter on "Employee Benefits"
EEOC News Release, August 20, 2001 "EEOC Rescinds Guidance; Will Review Policy on Retiree Health Plans
U.S. EEOC, Milwaukee District Office, conciliation draft letter
U.S. EEOC, Milwaukee District Office, Education Minnesota Letter
U.S. EEOC, Milwaukee District Office, Minnesota Union Letter

TAB E

The Future of Public Education – Vouchers and School Choice – Fair Competition or an Unequal Playing Field

Marcus Egan, Director, Voucher Strategy Center, National School Boards Association, Alexandria, VA

"What the Public Thinks about Vouchers and Why," NSBA News Release, September 25, 2001
NSBA/Zogby Poll, The State of the Voucher Movement
What's Wrong with Vouchers? Existing Programs Provide Ample Answers. NSBA, August 2001
"Vouchers and Tax Credits: 2001 Legislation," by Marcus Egan, *Inquiry & Analysis*, October 2001
"The Unlevel Playing Field: How the rules differ for Ohio's public and private schools," Education Information Center, OH, December 1996
Public Schools and Vouchers: Is it True Competition, NSBA October 26, 2001
Voucher News at Your Fingertips, www.nsba.org/novouchers

"Searching for a 'Level Playing Field': Some Observations About Arizona's Market-Based Education System," by **Tom Pickrell**, General Counsel, Mesa Public Schools, Mesa, AZ

TAB F

"Title I of the Elementary and Secondary Education Act of 1965 in a Nutshell," by **Kay Rigling,** Office of General Counsel, U.S. Department of Education, Washington, DC

TAB G

"Bridging the Gaps: Strategies to Address Legal and Policy Challenges to High Stakes Testing," by **Arthur L. Coleman** and **Scott Palmer**, Nixon Peabody, LLP, Washington, DC

> "A Framework for Addressing Student Test Issues," by Arthur C. Coleman, from *Student Testing and Assessment: Answering the Legal Questions*, NSBA, September 2000

TAB H

"The Americans with Disabilities Act: Survey of Case Law Relating to the School Environment," by **Cynthia Lutz Kelly**, Kansas Association of School Boards, Topeka, KS

"Identifying and Responding to Disabled Employees Under the Americans With Disabilities Act," by **Nancy Fredman Krent** and Ellen B. Rothenberg, Hodges Loizzi, Eisenhammer, Rodick & Kohn, Arlington Heights, IL

TAB I

"Ethics and the School Attorney: Selected Issues," by **James G. "Gil" Middlebrooks**, Smith Helms, Mulliss & Moore, Charlotte, NC

TAB J

"The Children's Internet Protection Act," by **Edwin C. Darden**, Senior Staff Attorneys, National School Boards Association, Alexandria, VA

TAB K

Advising Clients on Effective Student Discipline Policies: What is the Balance Between Due Process/Equity and Zero Tolerance?

D. Patrick Lacy, Jr., Reed Smith Hazel & Thomas, LLP, Richmond, VA and **Richard A. Schwartz**, Schwartz & Shaw, Raleigh, NC

> U.S. Department of Education 2000 Annual Report on School Safety
> NAESP Principal Online – Zero Tolerance: A Win-Lose Policy
> NASBE Policy Update - Zero Tolerance Policies, February 2001
> NSBA/OGC Zero Tolerance Policy
> "Review by Circuit of Zero Tolerance Cases," by D. Patrick Lacy, Jr. and Kelly C. Horan, Reed Smith Hazel & Thomas LLP, Richmond, VA
> Sample Policies on Zero Tolerance
> Selected School Violence Research Links

TAB L

Federal Issues and National Trends

Julie Underwood, Associate Executive Director and General Counsel, National School Boards Association, Alexandria, VA

"The 2000-2001 Term of the United States Supreme Court and Its Impact on Public Schools," by John W. Borkowski, Alexander E. Dreier and Maya R. Kobersy, Hogan & Hartson, LLP, Washington DC, August 2001

"Selected School Law Cases July 2000 – July 2001," by **Julie K. Underwood,** Julie Lewis, Thomas Burns, Karen Walking-Eagle, National School Boards Association, Alexandria, VA

Elementary and Secondary Education Act, **Michael A. Resnick**, Associate Executive Director for Advocacy, National School Boards Association, Alexandria, VA

Legislative Focus During 107th Congress, NSBA, September 2001
NSBA letter August, 15, 2001 to House and Senate Conference Committee on ESEA

NSBA News Release September 25, 2001 on Cleveland Voucher Case

TAB M

"Inside the Supreme Court: What Supreme Court Decisions Don't Necessarily Tell Us," by **Lyle Denniston**, Supreme Court Correspondent, Boston Globe, Alexandria, VA

ACLJ MEMORANDUM

RELIGION IN THE PUBLIC SCHOOLS

Presented By: Jay A. Sekulow, Chief Counsel[*]

INTRODUCTION

This memorandum presents the ACLJ's perspective on three areas of law involving church/state matters in the public school. Specifically, the following issues are addressed in light of the Supreme Court's decisions in *Doe v. Santa Fe Independent School District, Good News Club v. Milford*, and *Mitchell v. Helms*: 1) Religious expression on the public school campus; 2) access to public school facilities; and 3) the constitutionality of state and municipal school voucher programs.

---

[*] The author wishes to acknowledge the assistance of John P. Tuskey, Senior Research Counsel, Laura B. Hernandez, Associate Research Counsel, Shannon D. Woodruff, Associate Research Counsel.

I. Religious Expression in the Public Schools after *Santa Fe*

A. What *Santa Fe* Really Means

There is wide-spread confusion among school officials as to what constitutes protected religious expression in the public schools since the Supreme Court=s recent decision in *Santa Fe Independent School District v. Doe*, 120 S. Ct. 2266 (2000). At the outset, it is essential to recognize that the *Santa Fe* decision bears only on the question of student speakers at official school events. Nothing in *Santa Fe* calls into question the rights of students to engage in religious speech through Bible Clubs, one-on-one discussions, literature distribution, student-initiated activities (*e.g.*, "See You at the Pole"), and other similar activities. Nor does *Santa Fe* impair students' rights to engage in religious expression where they are already free to select the content and viewpoint of their speech, (e.g., talent shows, class assignments, show-and-tell, oratorical competitions, message bearing clothing or jewelry). *See Santa Fe*, 120 S. Ct. at 2281 (voluntary student prayer is permissible "at any time before, during or after the schoolday"); (Establishment Clause does not "impose a prohibition on all religious activity in our public schools").

In *Santa Fe v. Independent School District v. Doe*, 120 S. Ct. 2266 (2000), the Supreme Court held that the Establishment Clause of the First Amendment prohibits school officials from taking any affirmative steps to facilitate prayer at school-sponsored functions. Several factors were key to the Supreme Court=s ruling in *Santa Fe*, which addressed the question of student-led prayer before football games: 1) the school board historically had been involved in prayer at school functions; 120 S. Ct. at 2279; 2) the school board adopted a policy allowing students to vote whether to have an invocation or message before football games; 3) the policy also allowed students to elect the student who would give the invocation or message at each football game during the school year. 120 S. Ct. at 2273.

The Court concluded from these facts that the school district Afailed to divorce itself from the religious content in the invocations" and "crossed the line from State neutrality toward religion to State sponsorship of religion." *Id.* at 2277. Of special significance to the Court was its belief that the school board=s policy approved specifically of an invocation. *Id.* Another significant flaw in the school board=s policy was, in the Court=s view, the majoritarian process implemented under the policy. "Simply by establishing this school-related procedure, which entrusts the inherently nongovernmental subject of religion to a majority vote, a constitutional violation has occurred." 120 S. Ct. at 2266. The Court was very disturbed at the thought that "the majoritarian process implemented by the District guarantees, by definition, that minority candidates will never prevail and that their views will be effectively silenced." *Id.* at 2276. The Court concluded that the prayers offered at football games would not really be private speech because they bear the "imprint of the State." *Id.* at 2277 (quoting *Lee v. Weisman*, 505 U.S. 577, 590).

In sum, the decision in *Santa Fe* was heavily fact dependent. The *Santa Fe* Court reaffirmed the foundational principle that "there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." 120 S. Ct. at 2275 (quoting *Board of Ed. v. Mergens,* 496 U.S. 226, 250 (1990)). Religious speech may be private even when it occurs at school-sponsored events. The Court was careful to point out that not every student message delivered at a school function can be attributed to the government. *Id.* at 2277.

B. Lower Federal Court Decisions Interpreting *Santa Fe*

A few lower federal courts have interpreted *Santa Fe* with a variety of results. For example, the Court of Appeals for the Eleventh Circuit has held that *Santa Fe* does not require the suppression of all student religious speech, even if that speech occurs at school-sponsored events. In *Chandler v. Siegelman*, 230 F.2d 1313 (11th Cir. 2000), the court struck down a portion of an injunction which barred students from praying at any school function. The court distinguished *Santa Fe* by stating that "*Santa Fe* condemns school *sponsorship* of student prayer. *Chandler* condemns school *censorship* of student prayer." 230 F.3d at 1315 (emphasis in original). Crucial to the court=s decision was the principle that religious speech occurring at school functions may still be private speech provided "the speech is genuinely student-initiated, and not the product of any school policy which actively or surreptitiously encourages it." *Id.* at 1316.

> Permitting students to speak religiously signifies neither state approval nor disapproval of that speech. The speech is not the State=s B either by attribution or by adoption. The permission signifies no more than that the State acknowledges its constitutional duty to tolerate religious expression. Only in this way is true neutrality achieved.

Id. at 1317. The court concluded that it is "not the public context that makes some speech the State=s. It is entanglement with the State .... Therefore if nothing in the Constitution prohibits any public school student from voluntarily praying at any time before, during, or after the school day, *Santa Fe*, 120 S. Ct. at 2281, then it does not prohibit prayer aloud or in front of others, as in the case of an audience assembled for some other purpose." *Id.* at 1316-17.

The same court again distinguished *Santa Fe* in the context of a graduation prayer case. Adopting the Supreme Court's practice of using hair-splitting distinctions to decide Establishment Clause cases, the Eleventh Circuit upheld a school district's graduation prayer policy remarkably similar to the football prayer policy struck down in *Santa Fe*. *Adler v. Duval County School Bd.*, 250 F.3d 1330 (11th Cir. 2001) (en banc). Specifically, as did the policy in *Santa Fe*, the Duval County School Board policy permitted students to vote whether to have a graduation prayer, and to elect the student who would give the prayer.

Notwithstanding the Supreme Court=s clear condemnation of the majoritarian vote provision of the *Santa Fe* policy, the court in *Adler* upheld the Duval County policy. The court=s opinion rests on two distinguishing features in the Duval County policy. The first distinction was that Duval County=s policy expressly prohibited school officials from having any input into the content of the "message." 250 F.3d at 1336. The Santa Fe policy, by contrast, gave school officials some editorial control over the content of the student speech. *Santa Fe*, 121 S. Ct. at 2276. The second point of distinction was that the Santa Fe policy referred to an "invocation or message," whereas the Duval County policy referred only to a student "message." 250 F.3d at 1336. The Duval County policy was entitled "Graduation Prayers," and the policy provided for a two-minute message at the beginning or end of the graduation ceremony. Nevertheless, the fact that the policy did not use the term "invocation," was enough to convince the *Adler* court that the policy did not evince the same "preference" for religious speech that was fatal to the Santa Fe policy. *Id.* at 1338.

Another significant case decided since *Santa Fe* came out of the Court of Appeals for the Ninth Circuit. Expanding *Santa Fe* way beyond any reasonable interpretation, the Ninth Circuit essentially held that any publicly announced religious speech occurring at a graduation ceremony is government speech and is therefore unconstitutional. In *Cole v. Oroville Union High School District*, 228 F.3d 1092 (9th Cir. 2000), a valedictorian composed a speech which included many references to Jesus Christ. The school principal, who reviewed all student speeches to be given at graduation ceremonies, forbade the valedictorian from delivering the speech as written, and instructed him to purge the "sectarian" language. The valedictorian refused to do so and the principal accordingly refused to allow him to deliver his address at the ceremony. 228 F.3d at 1096-97.

The Ninth Circuit held that the principal=s censorship was required to avoid an Establishment Clause violation. Ignoring the fact that the Supreme Court has never upheld a free speech violation on Establishment Clause grounds, the court held that because the school district retained "plenary control" over the graduation ceremony, any religious speech occurring from the podium would be attributable to the state and would therefore constitute an impermissible endorsement of religion. 228 F.3d at 1103.

The Ninth Circuit=s decision in *Cole* flies in the face of established free speech principles and is nothing less than judicially-endorsed viewpoint discrimination. There is nothing in *Santa Fe* that suggests that school officials should aggressively censor all student expression simply because it occurs at school-sponsored events. The law regarding the First Amendment rights of students is well-established, with the unmistakable directive that student speech cannot be restricted solely because of the content of that speech.

The Supreme Court has held that school administrators can only prohibit protected speech by students when it "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school." *Tinker*, 393 U.S. at 509. In a case in which a salutatorian's address was being censored to exclude religious references, even the Indiana Civil Liberties Union proclaimed that "it would violate the free speech clause of the First Amendment for the school corporation to censor [the student's] speech based on its content, even if that content included a religious message or prayer." Motion to Appear Amicus Curiae, *Ostler, et. al. v. Community Schools of Frankfort, et. al.*, Cause No. IP93 - 581C (S.D. Ind., 1993) (emphasis added).

It is well settled that religious speech is protected by the First Amendment of the Constitution. *Widmar v. Vincent*, 454 U.S. 263, 269 (1981) (citing *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981); *Westside Community Schools v. Mergens*, 496 U.S. 226 (1990); *Niemotko v. Maryland*, 340 U.S. 268 (1951); *Saia v. New York*, 334 U.S. 558 (1948)). A governmental body may not suppress or exclude the speech of private parties for the sole reason that the speech contains a religious perspective. *Widmar*, 454 U.S. at 269. The Supreme Court has directly affirmed public school students= First Amendment right to free speech. "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years." *Tinker*, 393 U.S. at 506.

The First Amendment precludes any governmental effort to single out and censor or otherwise burden the speech of private parties *solely because that speech is religious. See Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993). As the Supreme Court stated in *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 761 (1995). "[I]n Anglo-American history, at least, government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be Hamlet without the prince."

Where students have been granted freedom to compose their own speeches (e.g., valedictorian or salutatorian addresses), protected student expression should not be subjected to censorship because of its content.

II. The Right of Access to Public School Facilities

A second area of confusion for many school districts is how to regulate the use of school facilities by outside community groups, namely religious groups. Despite clear admonitions from the Supreme Court, some school districts and courts continue to adopt facilities use policies which allow broad access by the community and yet singularly exclude "religious uses." Almost invariably, such policies are also justified by the mistaken notion that permitting such uses would violate the Establishment Clause. In actuality, this practice proceeds from the fundamentally flawed premise that the government can define the boundaries of a limited public forum along expressly religious lines. This premise cannot be reconciled with basic principles of Free Speech.

A. *Good News Club v. Milford*

The Supreme Court's most recent decision in this area is *Good News Club v. Milford*, 121 S. Ct. 2093 (2001), in which the Court resolved a conflict among the Courts of Appeals as to whether speech could be excluded from a limited public forum based on the religious nature of the speech.

In *Good News*, the Court considered the validity of a community use policy which opened Milford Central School facilities to a broad spectrum of "social, civic, and recreational meetings and entertainment events," but expressly prohibited use "by any individual or organization for religious purposes." *Id.* at 2097. Pursuant to this policy, the Good News Club ("the Club") sought and was denied access to those facilities. The Club was a private, community-based Christian youth organization whose purpose is to instruct children in moral values from a Christian perspective. Milford justified its denial of the club's request because

> the kinds of activities proposed to be engaged in by the Good News Club were not a discussion of secular subjects such as child rearing, development of character and development of morals from a religious perspective, but were in fact the equivalent of religious instruction itself.

Id.

Good News presented almost an exact replay of the issues and arguments presented to the Court in *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993). Just as it had done in *Lamb's Chapel*, the Court declined to decide whether a school district's opening of its facilities in this manner creates a limited or a traditional public forum. *Good News*, 121 S. Ct. at 2100. The parties in *Good News* agreed that Milford created a limited public forum; therefore, the Court operated under that assumption and went on to clarify the standards it would apply to determine whether the school district had unconstitutionally excluded the Club:

> When a State establishes a limited public forum, the State is not required to and does not allow persons to engage in every type of speech. The State may be justified in reserving [its forum] for certain groups or for the discussion of certain topics. The State's power to restrict speech, however, is not without limits. The restriction must not discriminate against speech on the basis of viewpoint, and the restriction must be reasonable in light of the purpose served by the forum.

Good News, 121 S. Ct. at 2100 (internal citations and quotations omitted).

Applying that test, the Court drew on its analysis in two previous decisions, *Lamb's Chapel* and *Rosenberger v. Rector and Visitors of Univ. Of Va.*, 515 U.S. 819 (1995):

> In *Lamb's Chapel*, we held that a school district violated the Free Speech Clause of the First Amendment when it excluded a private group from presenting films at the school based solely on the films' discussions of family values from a religious perspective. Likewise, in *Rosenberger*, we held that a university's refusal to fund a student publication because the publication addressed issues from a religious perspective violated the Free Speech Clause.

Good News, 121 S. Ct. at 2100. The Court found that Milford's exclusion of the Club was indistinguishable from those cases and constituted impermissible viewpoint discrimination. *Id.* The Court declined to decide whether the exclusion was also unreasonable in light of the purposes served by the forum.

That Milford had opened the forum for a variety of purposes, specifically allowing any group that "promotes the moral and character development of children," formed the basis of the Court's decision. *Id.* at 2101. The Club no doubt dealt with a subject otherwise permissible under the policy -- the teaching of morals and character -- albeit from a religious perspective. It was of no consequence to the Court that the Club chose to teach its lessons through Bible stories and prayer, instead of through films as in *Lamb's Chapel*, because "both modes of speech use a religious viewpoint." *Good News*, 121 S. Ct. at 2101. The Court rejected the lower court's characterization of the Club's methods as "quintessentially religious" and therefore warranting treatment different in kind from other activities:

> We disagree that something that is "quintessentially religious" or "decidedly religious in nature" cannot also be characterized properly as the teaching of morals and character development from a particular viewpoint. What matters for purposes of the Free Speech Clause is that we can see no logical difference in kind between the invocation of Christianity by the Club and the invocation of teamwork, loyalty, or patriotism by other associations to provide a foundation for their lessons. It is apparent that the unstated principle of the Court of Appeals' reasoning is its conclusion that any time religious instruction and prayer are used to discuss morals and character, the discussion is simply not a 'pure' discussion of those issues. . . . We, however, have never reached such a conclusion. Instead, we reaffirm our holdings in *Lamb's Chapel* and *Rosenberger* that speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint.

Id. at 2102.

Justice Scalia wrote a concurrence in which he agreed with the majority's conclusion that Milford discriminated on the basis of viewpoint, and further pointed out that the exclusion failed First Amendment scrutiny regardless of whether its action was characterized as viewpoint or subject-matter discrimination because "[e]ven subject-matter limits must at least be reasonable in light of the purpose served by the forum." *Id.* at 2108 (internal quotations omitted).

Policies such as those struck down in *Good News* and *Lamb's Chapel* are frequently conceived under the misconception that excluding religious uses is required to avoid violating the Establishment Clause. To the contrary, the Supreme Court's religion cases require a policy of neutrality toward religion that in no way necessitates or justifies the exclusion of religious speakers or religious topics. The Court rejected Milford's argument, stating that "Milford's implication that granting access to the Club would do damage to the neutrality principle defies logic." *Id.* at 2104.

> For the "guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse."

Id. at 2104 (quoting *Rosenberger*, 515 U.S. at 839). The Court explained that allowing the Club access "would ensure neutrality, not threaten it." *Id.*

In addition to neutrality, the Court has repeatedly emphasized the distinction between direct government involvement in religious speech or activity and government toleration of private religious expression. As the Court in *Mergens* recognized, "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." 496 U.S. at 250 (plurality) (emphasis in original). Furthermore, the Court has explained that no valid Establishment Clause interest exists where private speech is permitted in a forum already available to other groups, held after school hours, not sponsored by the school, and open to any who wished to attend, not just members. *See Lamb's Chapel*, 508 U.S. at 395; *Widmar v. Vincent*, 454 U.S. at 272-273 (1981). To the extent that the risk of perceived endorsement is relevant in this type of an Establishment Clause challenge, these factors effectively minimize that risk.

As a last resort, Milford sought to bolster its endorsement argument and distinguish *Lamb's Chapel* and *Widmar* by emphasizing that its policy involved elementary school children. According to Milford, "children will perceive that the school is endorsing the Club and will feel coercive pressure to participate." *Id.* at 2103. The Court was quick to point out that "whatever significance we may have assigned in the Establishment Clause context to the suggestion that elementary school children are more impressionable than adults, we have never extended our Establishment Clause jurisprudence to foreclose private religious conduct during nonschool hours merely because it takes place on school premises where elementary school children may be present." *Id.* at 2104 (internal citation omitted). The Court distinguished earlier statements it had made which appeared to weigh impressionability in its decisions,[1] explaining that those cases involved state advancement of religion. The Court deliberately minimized the significance of such statements in the Equal Access arena: "[W]e did not suggest that, when the school was not actually advancing religion, the impressionability of students would be relevant to the Establishment Clause issue." *Id.* at 2105. Furthermore, the Court aptly noted that in considering whether the community would feel coercive pressure to participate in the Club's activities "the relevant community would be the parents, not the elementary school children" because it is the parents who choose whether their children attend the Club's acitivites. *Id.* at 2104. The Court also explained that the danger of misperception could cut both ways:

---

[1] *See, e.g., Lee v. Weisman*, 505 U.S. 577, 592 (1992) ("there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools"); *Board of Ed. of Westside Community Schools v. Mergens*, 496 U.S. 226, 250-51 (1990) (O'Connor, J., concurring) (suggesting that younger students may not be as capable as high school students of distinguishing between government and private endorsement of religion); *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987) (noting that students were susceptible to pressure in the classroom, particularly given their possible reliance on teachers as role models); *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 390 (1985) ("symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice").

> [E]ven if we were to inquire into the minds of schoolchildren in this case, we cannot say the danger that children would misperceive the endorsement of religion is any greater than the danger that they would perceive a hostility toward the religious viewpoint if the Club were excluded from the public forum.

Id. at 2106. Finally, the Court refused to employ what it called a "modified heckler's veto" that would proscribe religious activity based on "what the youngest members of the audience might misperceive." *Id.*

B. *Good News* Has Important First Amendment Implications

The most significant implication of *Good News* was the repudiation of misguided public forum jurisprudence, not only in the Second Circuit, but in the Fifth and Ninth Circuits as well.[2] *See e.g.*, *Gentala v. Tucson,* 244 F.3d 1065 (9th Cir. 2001); *Campbell v. St. Tammany Sch. Bd.*, 206 F.3d 482 (5th Cir. 2000); *Bronx v. Household of Faith v. Community School District,* 127 F.3d 207 (2d Cir. 1997). In doing so, the Court expressly endorsed the public forum analysis employed by the Eighth and Tenth Circuits in *Good News/Good Sports Club v. School Dist. of Ladue*, 28 F.3d 1501 (8th Cir. 1994) and *Church on the Rock v. Albuquerque*, 84 F.3d 1273 (10th Cir. 1996), respectively. *Good News*, 121 S. Ct. at 2099.

Before *Good News*, the errant public forum doctrine, advocated most prominently by the Second Circuit, upheld facilities use policies which excluded "religious use" by characterizing the particular facility as a limited public forum, and then excluding religious speech under the guise of a valid content-based, subject matter restriction. This argument rests on a supposed distinction between the discussion of secular subjects from a religious viewpoint, deemed permissible, and religious speech, often labeled as religious instruction, prayer, or worship, deemed impermissible.

---

[2] The Court was unequivocal in its position, describing the *Bronx* decision of the Second Circuit as lying on the wrong side of the circuit split.

Justice Scalia, concurring in *Good News*, illustrated the impossible distinctions required when a speaker may comment on a topic from a religious viewpoint but may not "independently discuss the religious premise on which its views are based." *Id.* at 2109 (Scalia, J., concurring). "Effectiveness in presenting a viewpoint rests on the persuasiveness with which the speaker defends his premise -- and in respondent's facilities every premise but a religious one may be defended." *Id.*

With *Good News,* the Supreme Court has resolved, once and for all, the standards governing religious speech in a limited public forum. A policy that permits speech on certain topics, but excludes speakers whose speech it deems too religious, can no longer be justified as a permissible content-based restriction in a public forum. Rather, it constitutes impermissible viewpoint discrimination. Public schools and other government fora can no longer exclude religious instruction, prayer, or worship simply by claiming that they had not opened their facilities to that subject matter. Nor can such prohibitions be accomplished by labeling the proposed religious use a "religious service" or "proselytizing." Such labels are legally irrelevant in light of *Good News.* 121 S. Ct. at 2098, 2102, n. 4.

The Court also once again foreclosed the use of the Establishment Clause -- and the impressionability argument, in particular -- to justify this type of viewpoint discrimination. Neutrality demands that a public school that opens its facilities to secular groups and speakers not only *may*, but *must*, offer those facilities to religious groups and speakers on an equal basis. *See, e.g., Lamb's Chapel*, 508 U.S. at 395-96. By treating religious and non-religious speech equally, the government ensures that "the message is one of neutrality rather than endorsement." *Mergens*, 496 U.S. at 248 (plurality).

C. *Good News* Applied in Lower Federal Court Decisions

Subsequent case law has relied on the *Good News* decision for a number of legal propositions. Upholding Virginia's moment of silence statute against Establishment Clause challenge, the United States Court of Appeals for the Fourth Circuit quoted *Good News* to reject the impressionability argument. *Brown v. Gilmore*, 2001 U.S. App. LEXIS 16623, at *24-25 (4th Cir. July 24, 2001). Specifically, the court echoed the Supreme Court's holding that to validate this endorsement argument "would result in the introduction of 'a modified heckler's veto, in which . . . religious activity can be proscribed on the basis' of sincere, but utterly mistaken perceptions of state endorsement of religion." *Id.* at *25 (quoting *Good News*, 121 S. Ct. at 2106); *see also Wells v. Denver*, 2001 U.S. App. LEXIS 15606, at *19-20 (10th Cir. July 2, 2001) (following *Good News* for the same rejection of the listener's perception). The Texas Supreme Court relied on a related portion of the *Good News* opinion which rejected claims of coercion to participate in a program that was strictly voluntary. *Williams v. Lara*, 2001 Tex. LEXIS 74, at 53 (Tex. June 28, 2001).

The Fifth Circuit looked to *Good News* for its use of the term "limited public forum" to describe "forums opened for public expression of particular kinds or by particular groups." *Chiu v. Plano Independent Sch. Dist.*, 2001 U.S. App. LEXIS 16592, at *30 (5th Cir. July 24, 2001) (Finding no viewpoint discrimination where school prevented distribution via school mail delivery system of parents' flyers criticizing new math program). The Court of Appeals for the Seventh Circuit cited to *Good News* for the proposition that "private religious speech enunciated on government property is not automatically attributed to the government." *Linnemeir v. Board of Trustees of Purdue Univ.*, 2001 U.S. App. LEXIS 17922, at *13 (7th Cir. August 7, 2001). Finally, the Ninth Circuit followed *Good News* explicitly to uphold the right of another Good News Club to use the facilities of an elementary school on the same terms as other community groups. *Culbertson v. Oakridge Sch. Dist. No. 76*, 2001 U.S. App. LEXIS 17448 (9th Cir. August 7, 2001).

D. Conclusion

Perhaps the most significant implication of *Good News* is the complete eradication of the discriminatory practices employed by the Second, Fifth and Ninth Circuit Courts of Appeals. Law which until now has cabined religious speech into a separate and excludible category has been rejected, both in letter and spirit. The Court reaffirmed the protected status of religious speech in whatever form it may take – instruction, prayer, worship, or proselytizing – and ensured that the limited public forum can no longer be used to perpetuate unconstitutional religious discrimination.

In the wake of *Good News*, a school district is not left powerless to place restrictions on its forum. It could close its schools to all outside groups[3] or impose content-based restrictions on permissible speech, as long as it fashions those restrictions in religion-neutral terms. If a school has legitimate concerns and reasons for limiting access to certain groups, they remain free to target those concerns directly.[4] The policy struck down in *Good News* lacked any legitimate reason for excluding the Club's speech from its forum. As Justice Scalia succinctly put it, "'because it's religious' will not do." *Id.* at 2108 (Scalia, J., concurring).

III. The Constitutionality of School Vouchers

The ACLJ is committed to the principle that parents are responsible for the education of their children and that parents have the right to choose schools that best serve their educational needs. Maximizing educational choices for parents is therefore essential, especially for those families who are otherwise unable to afford private school tuition. School vouchers represent a permissible means of leveling the playing field so that all parents can choose the education that suits their values, and their childrens' needs. A state's efforts to provide funds to parents so that parents can more effectively choose the education they think best suits their children's needs is not an establishment of religion.

---

[3] The Saddleback Valley Unified School District in Orange County, California did just that. In an attempt to prevent a Christian club from receiving official status, the district abolished all 29 non-curricular social and service clubs from high school campuses. Charles Anderson, *School Clubs Lose Status*, The Orange County Register, June 14, 2001. By September, the school board had reversed its decision. Laura Corbin, *Clubs Allowed Campus Status SVUSD*, The Orange County Register, September 7, 2001. Other school districts, such as the one in Marion, Massachusetts, appropriately reversed their policies of barring religious groups from school facilities. *Marion Throws Out Policy Barring Religious Groups from School*, The Associated Press State & Local Wire, July 6, 2001.

[4] For example, a municipality can declare an area of a school or park off-limits for groups greater than 20 people. This neutral prohibition may well have the effect of limiting the area's use for religious exercises but it does so without constitutional difficulty. Only when the municipality expressly adds religious services to the list of forbidden uses does it cross a constitutional line.

The Supreme Court recently granted certiorari in three companion cases involving the constitutionality of Cleveland, Ohio's school voucher program. *See Taylor v. Simmons-Harris,* 2001 U.S. Lexis 5353 (U.S. Sept. 25, 2001); *Zelman v. Simmons-Harris*, 2001 U.S. Lexis 5351 (U.S. Sept. 25, 2001); *Hanna Perkins Sch. v. Simmons-Harris*, 2001 U.S. Lexis 5352 (U.S. Sept. 25, 2001). In *Simmons-Harris v. Zelman*, 234 F.3d 945, 953 (6th Cir. 2000), the Sixth Circuit had struck down Cleveland's school voucher program on the grounds that it violated the Establishment Clause. As discussed below, the ACLJ believes the Sixth Circuit misapprehended the significance of the Supreme Court's decision in *Mitchell v. Helms*.

A. The Effect of *Mitchell v. Helms* on the Constitutionality of School Vouchers

The Supreme Court's decision in *Mitchell v. Helms*, 120 S. Ct. 2530 (2000) augurs well for school vouchers because a majority of the Justices signaled that they are leaning toward a neutrality approach in evaluating Establishment Clause challenges to government aid programs that benefit religious schools. More importantly, however, *Mitchell* is significant because Justice O'Connor and Justice Breyer, two swing votes on Establishment Clause issues, emphasized the constitutionally significant distinction between "private choice" government aid programs – those that distribute funds to parents, who then disburse the money to the school of their choice – and per capita aid programs, such as the one at issue in *Mitchell*. 120 S. Ct. at 2559 (O'Connor, J., concurring). Because school voucher programs, including the Cleveland, Ohio program, typically involve the distribution of government funds directly to parents, a cautiously optimistic reading of *Mitchell* suggests that the current Supreme Court will uphold their constitutionality.

29

In *Mitchell*, plaintiffs challenged a federal program in which the federal government distributed money to state and local governmental agencies, which in turn bought educational material and equipment on behalf of certain public and private schools. The local agencies then lent what they had purchased to the schools. *See Mitchell*, 120 S. Ct. at 2537 (plurality opinion). Through the program, private schools were able to acquire such items as library books, computers, television sets, and laboratory equipment. *Id.* In the challenged school district, approximately 30% of the funds went to private schools. Of the 46 private schools participating in the program, 41 were religiously affiliated. *Id.* at 2538.

Overruling two earlier decisions addressing the constitutionality of government aid to religious schools, *Wolman v. Walter*, 433 U.S. 229 (1977); *Meek v. Pittenger*, 421 U.S. 349 (1975), the Court abandoned its previous holding that "pervasively sectarian" institutions could not be eligible for government funds. 120 S. Ct. at 2550-51 (plurality opinion); *id.* at 2556 (O'Connor, J., concurring) (agreeing that *Meek* and *Wolman* should be overruled). The Court held that the per capita federal aid program was constitutional under the Establishment Clause because, applying the test outlined in *Agostini v. Felton*, 521 U.S. 203, 222-23 (1997), the program did not have the primary effect of advancing or inhibiting religion. 120 S. Ct. at 2551; (plurality opinion); *id.* at 2556-57 (O'Connor, J., concurring in the judgment).

Justice Thomas authored the plurality opinion in which he, Justices Rehnquist, Scalia and Kennedy held that the neutrality of aid criteria is the most important factor in considering the effect of a government aid program. The plurality opinion noted that the Court has "consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion." 120 S.Ct. at 2541. Thus, in the plurality's view, a government aid program is constitutional as long as the "religious, irreligious, and areligious are all alike eligible for governmental aid." *Id.* "If the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose, then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose." *Id.* (internal citation omitted).

The *Mitchell* plurality also held that governmental aid can even be divertible to religious use if the criteria used to dispense the aid are neutral and the purpose of the aid is secular. *Id.* at 2554. The crucial factor was how the aid is assigned, not where the aid goes. In similar vein, the plurality jettisoned the notion that "pervasively sectarian" institutions cannot be the beneficiaries of neutral government benefits on an equal basis with other private groups. The plurality denounced the Court's past decisions holding that the depth and sincerity of an educational institution's religious beliefs should affect its eligibility for otherwise neutrally available government benefits. The "pervasively sectarian" doctrine has "a shameful pedigree," was "born of bigotry," and "should be buried now." 120 S. Ct. at 2550-51.

> [T]he religious nature of a recipient should not matter to the constitutional analysis, so long as the recipient adequately furthers the government's secular purpose. If a program offers permissible aid to the religious (including the pervasively sectarian), the a religious [sic] and the irreligious, it is a mystery which view of religion the government has established, and thus a mystery what the constitutional violation would be. The pervasively sectarian recipient has not received any special favor, and it is most bizarre that the Court would, as the dissent seemingly does, reserve special hostility for those who take their religion seriously, who think that their religion should affect the whole of their lives, or who make the mistake of being effective in transmitting their views to their children.

Id. at 2551. Finally, the plurality opinion pointed out the inconsistency of the pervasively sectarian exclusion with other First Amendment principles. For example, the doctrine collides with the notion that "courts should refrain from trolling through a person's or an institution's religious beliefs." *Id; see also Employment Division v. Smith*, 494 U.S. 872, 887 (1990).

Justices O'Connor and Breyer concurred in the result in *Mitchell*, but wrote a lengthy concurrence outlining two specific points of departure with the plurality. Conspicuously absent was any disagreement on the question of whether pervasively sectarian institutions should be excluded from government aid programs.[5] Indeed, in joining with the plurality in expressly overruling *Meek v. Pittenger* and *Wolman v. Walter*, Justices O'Connor and Breyer implicitly agreed with the plurality that the "pervasively sectarian doctrine" was outmoded. *See Mitchell*, 120 S. Ct. at 2556 (O'Connor, J., Breyer, J., concurring). In both *Meek* and *Wolman*, the Court struck down aid programs similar to the aid program in *Mitchell*. The Court ruled in *Meek* and *Wolman* as it did because the "religious schools receiving the materials and equipment were pervasively sectarian." *Mitchell*, 120 S. Ct. at (O'Connor J., concurring) (citing *Meek*, 421 U.S. at 365-66 and *Wolman*, 433 U.S. at 250, 97 S.Ct. 2593).

Moreover, Justices O'Connor and Breyer criticized the Court's decisions in *Meek* and *Wolman* for "apply[ing] an irrebuttable presumption that secular instructional materials and equipment would be diverted to use for religious indoctrination." *Id.* at 2567. Instead of focusing on this irrebuttable presumption that even the secular courses in a religious school are "inescapably" religious, Justices O'Connor and Breyer would require plaintiffs to "prove that the aid in question actually is, or has been, used for religious purposes." *Id.* By focusing on actual diversion of aid, instead of the presumption that any secular class at a religious school would "inevitably inculcate religion," they strongly implied that the pervasively sectarian doctrine was irrelevant to Establishment Clause analysis. *Id.*

Justices O'Connor and Breyer also agreed that neutrality was very important, but they disagreed with the plurality that it was dispositive. They specifically faulted the plurality for relying on the Court's decisions in *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986) and *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993) for the proposition that neutrality alone was a sufficient grounds to uphold the constitutionality of a government aid program.[6] Justices O'Connor and Breyer thought that *Witters* and *Zobrest* should not control because they involved "private choice" government aid programs in which the aid went to the religious school only because of the students' independent choice to so direct it. 120 S. Ct. at 2559.

---

[5] The plurality opinion remarked upon the concurrence's apparent acquiescence on the point. 120 S. Ct. at 2550 (plurality opinion).

> When the government provides aid directly to the student beneficiary, that student can attend a religious school and yet retain control over whether the secular government aid will be applied toward religious education. The fact that aid flows to the religious school and is used for the advancement of religion is therefore *wholly* dependent on the student's private decision.

Id. (emphasis in original). Justices O'Connor and Breyer thought that the distinction between private choice programs and per capita programs was important for three reasons, all of which are relevant to school voucher programs: First, there could be no impermissible diversion of government funds if the funds went to the school only as the result of the student's independent choice. *Id.* at 2558. Justices O'Connor and Breyer analogized private choice programs to the situation in which a government employee receives his paycheck and then donates all or a portion of it to a religious charity. *Id.* Whatever the charity then does with the money cannot in any way be attributed to state action.

Second, private choice programs raised no concern about government endorsement of religion.

> In terms of public perception, a government program of direct aid to religious schools based on the number of students attending each school differs meaningfully from the government distributing aid directly individual students who, in turn, decide to use the aid at religious schools. In the former example, if the religious school uses the aid to inculcate religion in its students, it is reasonable to say that the government has communicated a message of endorsement. ... In contrast, when government aid supports a school's mission only because of independent decisions made by numerous individuals to guide their secular aid to that school, "no reasonable observer is likely to draw from the facts ... an inference that the State itself is endorsing a religious practice or belief.

---

[6] In *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), the Court held that a Washington state program under which a blind student received government funds to attend a Christian college was constitutional because the funds were granted according to neutral criteria. And in *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1, 3 (1993), the Court held that a school district could provide a sign language interpreter (at government expense) to a student in a Catholic high school. The program was available for both public and private school students. *Id.* at 3.

Id. at 2559 (quoting *Witters*, 474 U.S. at 493). Third, private choice programs raise none of the Establishment Clause concerns associated with direct money subsidies to religious organizations, because no government funds go directly into their coffers. *Id.* at 2559-60.

Thus, Justices O'Connor and Breyer, whose opinion in *Mitchell* will control[7] in future cases involving government aid to sectarian schools, have given a strong clue about how they will view the constitutionality of school vouchers. Under the *Agostini* test that Justices O'Connor and Breyer used in *Mitchell*, a properly framed school voucher program should pass with flying colors. The *Agostini* test asks whether the government aid program to sectarian schools 1) results in government indoctrination; 2) defines its recipients by reference to religion; or 3) creates an excessive entanglement between government and religion. *See* 120 S. Ct. at 2560; *Agostini v. Felton*, 521 U.S. 203, 234 (1997).

Thus, as long as school voucher programs contain the following three components, they should be upheld. First, school voucher programs must have neutral eligibility requirements, neither favoring nor disfavoring religious schools. In other words, they must create no financial incentive for parents to send their children to private schools. Second, the program must contain a mechanism whereby government funds go to a religious school only as a result of the parents'selection of that school. This can be in the form of a check to the parents, who then endorse the check over to the school. The government aid therefore goes to religious schools only as a result of the independent choices of third parties. Third, the program must not entail excessive government involvement in the daily operation of the religious school.

By providing neutral aid to private schools — in particular vouchers to parents — the government does not create any financial incentive to choose private (including religious) schools over public schools. In the absence of a voucher or some other program defraying the costs of educational expenses, a parent can choose to send his children tuition-free to a public school or to pay tuition at a private school. Thus, without vouchers, the only financial incentive the government creates is the incentive to send children to public schools. Vouchers merely remove (or in most cases, reduce) this incentive by providing the wherewithal to pay all or part of private school tuition. Any incentive to take advantage of the voucher to send a child to private school is not financial (e.g., the desire to send a child to a private school because the school offers a better academic program or a program more suited to the child's needs) and is not created by the state.

---

[7] "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977) (internal quotations omitted).

The conclusion that merely providing vouchers does not create the forbidden financial incentive does not change even if the only private schools available to parents are religious. A lack of non-religious private schools should not matter because a non-religious alternative still exists — the public school. So long as the voucher program does not create artificial barriers to entry to the education market, the program does nothing to prevent anybody (whether religiously motivated or not) from opening a private school and taking advantage of the vouchers. In fact, by making private schooling more affordable and therefore more attractive to parents, vouchers may well encourage the establishment of new non-religious private schools.

School voucher programs also do not result in government indoctrination of religion. As the plurality noted in *Mitchell*, "if the government is offering assistance to recipients who provide, so to speak, a broad range of indoctrination, the government itself is not thought responsible for any particular indoctrination." 120 S. Ct. at 2541 (plurality).

A second key component of a constitutional school voucher program is that the aid given must go directly into the hands of the parents who then decide where to educate their children, and forward the aid accordingly. As Justices O'Connor and Breyer indicated in *Mitchell*, *see* 120 S. Ct. at 2559-60, aid that goes directly to religious schools raises many more red flags under the Supreme Court's Establishment Clause precedents. By contrast, the Court has consistently upheld government aid programs in which public funds flow to "sectarian schools only as a result of numerous private choices of individual parents of school-age children." *Mueller v. Allen*, 463 U.S. 388, 399 (1983), (upholding a Minnesota statute authorizing a tax deduction for educational expenses of students attending either public or private schools). Moreover, the *Mueller* Court dismissed as insignificant the fact that 96% of the schools involved were religious in nature. "We would be loath to a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law." *Id.* at 401.

Similarly, in *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), the Court held that a Washington state program under which a blind student received government funds to attend a Christian college was constitutional because "the fact that aid goes to individuals means that the decision to support religious education is made by the individual, not by the State." *Id.* at 487. And in *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1, 3 (1993), the Court held that a school district could provide a sign language interpreter (at government expense) to a student in a Catholic high school. The program was available for both public and private school students. *Id.* at 3.

> The service at issue in this case is part of a general government program that distributes benefits neutrally to any child qualifying as 'disabled' under the [statute], without regard to the sectarian-nonsectarian, or public-nonpublic nature of the school the child attends. *By according parents freedom to select a school of their choice, the statute ensures that a government paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents. In other words, because the statute creates no financial incentive for parents to choose a sectarian school, an interpreter's presence there cannot be attributed to state decision-making.*

Zobrest, 509 U.S. at 10 (emphasis added).

Finally, a school voucher program is likely to be held constitutional, provided it does not create an ongoing state presence in religious schools. The Supreme Court has held that government aid programs that benefit religious schools are unconstitutional if they result in an "excessive entanglement between government and religion." *See Agostini v. Felton*, 521 U.S. 203, 232 (1997). This entanglement can occur if a voucher program requires state oversight of curriculum, personnel, or administration decisions. The school voucher program in Cleveland, Ohio entailed no state intrusion into these areas, and indeed, the Sixth Circuit did not even address the entanglement prong of the *Agostini* test. *See Simmons-Harris v. Zelman*, 234 F.3d 945, 948-49 (6th Cir. 2000).

Finally, not only do the Court's Establishment Clause cases strongly support the constitutionality of school voucher programs, but the Court's Free Speech Clause cases strongly suggest that voucher programs that discriminate against religious schools would be impermissible. The Court has held that the discriminatory exclusion of religious organizations from generally available government benefits violates the First Amendment right to free speech. *See, e.g., Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819 (1995) (exclusion of student religious organization from participating in expense reimbursement program violated the Fist Amendment prohibition against viewpoint discrimination); *Good News Club v. Milford Central Sch. Dist.*, 121 S. Ct. 2093 (2001) (discriminatory exclusion of church groups from use of public school facilities constituted viewpoint discrimination in violation of the First Amendment.

B. Lower Court Decisions Addressing the Constitutionality of School Vouchers

The constitutionality of school vouchers is the subject of diametrically opposed decisions among state and federal appellate courts. The split among the federal and state judiciary on whether school voucher programs violate the Establishment Clause is due to confusion over whether the Supreme Court's recent school aid cases, including *Agostini v. Felton*, 521 U.S. 203 (1997) and *Mitchell v. Helms*, 120 S. Ct. 2530 (2000) control the question, or whether the Court's opinion in *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) governs. In *Nyquist*, the Supreme

Court struck down a New York statute that provided tax benefits for private school students because, in providing tax benefits for private school students, the program created an incentive for children to attend religious schools.

The Courts of Appeals for the First and Sixth Circuits have held that *Nyquist* dictates that school voucher programs that include religious schools be struck down. *See Strout v. Albanese*, 178 F.3d 57, 62 (1st Cir. 1999) (The court understood *Nyquist* to require Maine's tuition reimbursement program to exclude sectarian schools from participation); *Simmons-Harris v. Zelman*, 234 F.3d 945, 953 (6th Cir. 2000) (*Nyquist* compelled conclusion that Cleveland, Ohio's school voucher program was unconstitutional).

In contrast, three state supreme court decisions have explicitly rejected the analysis adopted by the First and Sixth Circuits. In *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999), the Ohio Supreme Court upheld against an Establishment Clause challenge the same Cleveland voucher program that the Sixth Circuit struck down. Rejecting the argument that *Nyquist* controlled, the Ohio Supreme Court observed: "The *Nyquist* holding has been undermined by subsequent case law that culminated in the court stating, 'we have departed from the rule … that all government aid that directly aids the educational function of religious schools is invalid.'" 711 N.E.2d at 208 (quoting *Agostini*, 521 U.S. at 225).

In *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998), the Wisconsin Supreme Court upheld a school voucher program very similar to the one adopted in Cleveland. "We reject Respondents' argument that this case is controlled by *Committee for Pub. Educ. and Religious Liberty v. Nyquist*." *Id.* at 614 n.9. Analyzing the Supreme Court's recent school aid cases, the court concluded that the Milwaukee Parental Choice Program, "which provides a neutral benefit directly to children of economically disadvantaged families on a religion neutral basis, does not run afoul of any of the three primary criteria the court has traditionally used to evaluate whether a state educational assistance program has the purpose or effect of advancing religion." *Id.* at 620.

Similarly, in *Campbell v. Manchester Board of School Directors*, 641 A.2d 352, 360 (Vt. 1994), the Vermont Supreme Court upheld a state tuition reimbursement scheme, finding the "case to be governed by *Mueller* and *Witters* and not by *Nyquist*." 641 A.2d at 360. The court reasoned that because the program covers all students whether they attend a public or private school, it "'neutrally provides state assistance to a broad spectrum of citizens [and] is not readily subject to challenge under the Establishment Clause.'" *Id.* (quoting *Mueller*, 463 U.S. at 398-99). *Cf. Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999) (upholding state tax credit for contributions to scholarship fund for private schools, even though significant percentage of Arizona private schools were religious); *Matthew J. v. Massachusetts Dep't of Educ.*, 989 F. Supp. 380, 391-92 (D. Mass. 1998) (upholding special education assistance for student attending Christian school).

In short, the lower federal courts' decisions in this case are irreconcilable with the decisions of the Ohio, Wisconsin, and Vermont Supreme Courts. The key to each court's decision was its interpretation of *Nyquist*. Interpreting *Nyquist* in a vacuum, as did the lower federal appellate courts, produced the decision that the school voucher program was unconstitutional. Interpreting *Nyquist* in the light of the Supreme Court's recent school aid decisions, including *Mitchell*, produces the opposite conclusion. Even if *Nyquist* retains some vitality after the Supreme Court's recent school aid cases, which is highly doubtful in our view, the case is distinguishable from school voucher programs, such as those in effect in Ohio and Wisconsin. The school voucher programs in effect in Ohio and Wisconsin benefit all eligible students alike, whether they choose to attend public, private, or sectarian schools. The tax benefit at issue in *Nyquist* benefited only those parents who sent their children to private schools. To the extent that *Nyquist* can be understood to cast doubt on the constitutionality of school voucher programs, the Supreme Court's decisions in *Mitchell*, *Agostini*, *Witters*, and *Zobrest* contradict such an interpretation.

C. Conclusion

In sum, *Mitchell* offers substantial hope to proponents of school vouchers. Unless the Court retreats from its emphasis on neutrality and private choice as key elements of constitutional government aid programs to sectarian schools, school voucher programs, such as the Cleveland program now before the Court, are likely to be upheld.

40

UNIVERSITY OF CINCINNATI
LAW REVIEW

Volume 62, No. 1 Summer 1993

THE LEGAL ARGUMENT AGAINST PRIVATE SCHOOL CHOICE

Steven K. Green

Steven K. Green, The Legal Argument Against Private School Choice, 62 UNIV. CIN. L.Rev. 37 (1993)

Reprinted with permission.

THE LEGAL ARGUMENT AGAINST PRIVATE SCHOOL CHOICE

Steven K. Green[*]

Private school "choice" has become the focus of the educational debate of the 1990s.[1] Proposals abound that would provide financial support to parents and assist them in selecting alternative forums for educating their children. President Bush's "America 2000" and "G.I. Bill for Children" would have allocated federal funds for demonstration choice projects throughout the nation.[2] Several states have considered more modest plans to assist parents in paying for private education.[3] The gist of these proposals is that enabling parents to choose between sending their children to public

---

[*] Legal Counsel, Americans United for Separation of Church and State; former Visiting Professor, Vermont Law School. My thanks to Barry Lynn, Oliver Thomas, and Joseph Conn for reading drafts of this Article.

[1] *See, e.g.*, Davis v. Grover, 480 N.W.2d 460, 485 (Wis. 1992) (Bablitch, J., dissenting) ("[N]o one can disagree that 'choice' is a major public policy involving fundamental educational decisions.").

[2] U.S. DEP'T OF EDUC., AMERICA 2000—AN EDUCATIONAL STRATEGY: SOURCEBOOK (1991) (Bush administration's comprehensive national educational improvement plan which, in part, recommended a voucher system whereby parents could send their children to private or public school of their choosing). *But see The Bush Administration's New Voucher Offensive*," 45 CHURCH & STATE 175, 175-79 (1992) [hereinafter *Bush Voucher Offensive*] (criticizing Bush's proposed "G.I. Bill for Children," which would have allocated $500 million for private school choice programs).

[3] The state of Wisconsin enacted the Milwaukee Parental Choice Program, which permits any pupil "who resides in the city to attend, at no charge, a nonsectarian private school located in the city" if certain requirements are met. WIS. STAT. § 119.23(2)(a) (1990). The statute limits eligibility for the program to families whose income is less than 1.75 times the poverty level and limits the number of eligible students to one percent of each school district's student population. *Id.* § 119.23(2)(b). Further, the state only will pay the private schools for a per-student amount, up to the total district allocation divided by the district pupil population. *Id.* § 119.23(2)(b)(4).

In Los Angeles, the Reason Foundation, a non-profit Libertarian institute, is attempting to pass a school voucher ballot, called the Parental Choice Initiative. The Initiative would set up a system by which parents could obtain $2,600 in tax money for tuition at the private school of their choice. Dan Morain, *Libertarians Succeed Without Winning Office*, L.A. TIMES, Dec. 14, 1992, at A3. The state of California will be holding a referendum on a voucher initiative in November 1993.

On November 3, 1992, voters in Colorado defeated a ballot initiative that would have rewritten the state constitution to allow statewide choice of schools, including private and religious schools. Carol Innerst, *Teachers, Bosses Undercut Choice*, WASH. TIMES, Nov. 30, 1992, at A1. The proposed amendment would have permitted parents to choose where to send their children to school and provided funding to those who selected licensed, private, or parochial schools outside of the public system. *Id.*; *see also* ERNEST L. BOYER, SCHOOL CHOICE 47-61 (1992); Lynn Olson, *New Approaches Blurring the Line Between Public and Private Schools*, EDUC. WK., Oct. 7, 1992, at 1 (discussing alternatives to traditional public school systems); Hilary Stout, *Business Funds Program in Indianapolis Letting Poor Children Flee Public Schools*, WALL ST. J., Feb. 27, 1992, at B1 (noting that

BEST COPY AVAILABLE

schools or their private counterparts will increase parental involvement in education and make public schools more responsive and more innovative as they compete for scarce resources and the best students. The result, it is argued, will be greater educational opportunities for all, as well as an improvement of America's decaying public educational system. An educational system based on free market principles will somehow solve the seemingly insurmountable problems facing our public schools.[4]

Choice advocates also argue, somewhat inconsistently, that private school choice will empower parents—especially those on the lower-economic level—to obtain a better education for their children than is afforded through the public educational system.[5] Here, the goal is not to improve education generally, but to provide access into the (better) private school system. Thus, a strange coalition has emerged: economically and religiously conservative interest groups paired with their anathema—poor inner-city parents who would otherwise support public spending policies. Incongruous scenes emerge as free market think-tanks parade former welfare mothers before the media to sing praises to Milton Friedman.

Choice proposals take many forms. Some programs, already in effect in a few states, are in the relatively passive form of tax deductions and credits for tuition costs associated with educating children at private schools.[6] Other more direct forms of assistance have in-

---

business-backed voucher system for low-income students has resulted in loss of state aid to Indianapolis public school system).

[4] *See generally* VIRGIL BLUM, FREEDOM OF CHOICE IN EDUCATION (1958) (proposing a "tax credit" program to improve education); JOHN E. CHUBB & TERRY M. MOE, POLITICS, MARKETS, & AMERICA'S SCHOOLS (1990) (arguing that government has not solved the nation's education problem because government is the problem, and proposing shift away from system of schools controlled directly by government—schools which do no more than breed inefficiency and stifle student achievement—to system of indirect control that relies on markets and parental choice); MILTON FRIEDMAN, CAPITALISM AND FREEDOM (1962) (arguing that competitive capitalism is necessary for political, economic, and educational freedom); MILTON FRIEDMAN & ROSE FRIEDMAN, FREE TO CHOOSE (1980) (arguing that growing role of government in education has wasted taxpayers' money and resulted in far poorer educational system than would have developed if voluntary cooperation played a larger role).

[5] John E. Coons & Stephen D. Sugarman, *Vouchers for Public Schools*, 15 INEQUALITY IN EDUC. 60 (1973) (describing vouchers as providing greater variety of choices within public school systems, as well as permitting access to private schools).

[6] *See, e.g.*, IOWA CODE §§ 422.09, 422.12 (1991). Iowa taxpayers may deduct from net income "the amount the taxpayer has paid to others, not to exceed one thousand dollars for each dependent in grades kindergarten through twelve, for tuition and textbooks of each dependent attending an [accredited] elementary or secondary school situated in Iowa." *Id.* § 422.09(f). In the alternative, Iowa taxpayers may credit to their computed state income taxes an amount "equal to five percent of the first one thousand dollars which the taxpayer has paid to others for each dependent in grades kindergarten through twelve, for tuition and textbooks of each dependant in attending an [accredited]

BEST COPY AVAILABLE

cluded actual tuition grants and tax abatements to parents of private school children.[7] The most popular form of proposed school choice assistance, however, is the voucher: a public scrip that the parent gives to the private school in lieu of tuition and that is redeemed by the private school for state cash. The voucher is the choice of choice of most federal proposals and is the form utilized in at least one state and proposed in several others.[8]

The policy arguments against private school choice are both numerous and compelling. Funds allocated to pay for vouchers inevitably come out of the overall public school budget. In a time of shrinking state revenues and substantial cuts in federal educational assistance, it makes little sense to expropriate precious resources from the public schools and give them to private schools. Tax schemes—deductions and credits—also involve the inverse transfer of public monies, resulting in fewer dollars for public education. While the proliferation of choice schemes and the resultant expansion of private schools will not "destroy" the public schools, they will lead—at a minimum—to the impoverishment of the public schools and the establishment of a two-tiered educational system. Even in a perfect world of unlimited resources, profound questions remain as to whether free market competition is an appropriate mechanism for improving our public schools.[9]

There is also serious doubt that private school choice will result in either expanded educational opportunities or true empowerment for lower and middle income parents. According to a recently released Carnegie Foundation report, private school choice does not appear to improve student achievement or stimulate public school

---

elementary or secondary school situated in Iowa." *Id.* § 422.12(2); *see also* Luthens v. Bair, 788 F. Supp. 1032 (S.D. Iowa 1992) (holding that Iowa statutory scheme does not violate Establishment Clause).

Minnesota taxpayers can deduct "the amount paid to others, not to exceed $650 for each dependent in grades kindergarten to 6, and $1,000 for each dependent in grades 7-12, for tuition, textbooks, and transportation of each dependent in attending an [accredited] elementary or secondary school situated in Minnesota, North Dakota, South Dakota, Iowa or Wisconsin." Minn. Stat. § 290.01 subd. 19b(3) (1991).

[7] *See* Barksdale v. Town of Epsom, 618 A.2d 814 (N.H. 1992) (invalidating tax abatement scheme that reimbursed parents for educational expenses incurred by educating children outside local school system).

[8] *See supra* note 3 and accompanying text.

[9] *See* Frederick C. Thayer, An End to Hierarchy! An End to Competition 81-115 (1973) (proposing alternative to nation's education woes by combining best of past with current modifications); Arnold F. Fege, *Private School Voucher: Separate and Unequal*, *in* Why We Still Need Public Schools 221, 221-35 (Art Must, Jr. ed., 1992); Eli Ginzberg, *The Economics of the Voucher System*, 72 Teachers C. Rec. 373, 373-82 (1971) (arguing that voucher systems will not solve problems of inner-city schools).

renewal.[10] The report also notes that economically and educationally disadvantaged parents are less able to take advantage of choice options. The average cost of private school tuition is between $4,000 and $5,000 per year, and even the most generous choice proposals do not provide even half the needed amount.[11] Upper income parents who can otherwise afford private education will be provided an extra bonus, while other parents will be forced to choose between sub-quality private education and the underfunded public schools.

Additionally, private school choice schemes provide indirect government support for discriminatory institutions. Private schools will continue to discriminate in admissions and hiring, often on racial and religious grounds, as well as restrict academic freedom according to their particular worldview. While many choice proposals purport to prohibit such discrimination, in reality there is little that can be done to limit the ability of private schools to select those students they prefer.[12] Moreover, religious schools retain added protection under Title VII to discriminate along religious lines when hiring employees.[13] Thus, public schools will remain the repository for "problem" children and those with disabilities, not to mention those students unable to afford the true cost of private education.[14]

Recently, the public debate surrounding private school choice has focused on these policy considerations to the neglect of the legal issues involved. The leading constitutional concern with choice proposals has traditionally been the Establishment Clause problems associated with funding religious schools. Unquestionably, the vast majority of private elementary and secondary schools in America are religiously oriented or affiliated, with religious schools accounting for more than ninety-five percent of all private school enrollment in some locations.[15] Many of these schools are of the traditional denominational variety (e.g., Catholic, Lutheran, Orthodox Jewish, Seventh-Day Adventist), often called "parochial" schools, while others represent schools of independent and unaffiliated churches and religious groups, such as fundamentalist Christian academies. Most religious schools are what the courts have termed "pervasively sectarian," indicating that the educational program includes religious indoctrination, worship, and general instruction from a religiously centered perspective.[16] Under traditional Establishment Clause jurisprudence, public assistance to sectarian schools is unconstitutional because such aid invariably advances the religious mission of the sponsoring institution, thereby violating the principle of government neutrality toward religion.[17]

---

[10] *See* Boyer, *supra* note 3, at 15-20.

[11] The Milwaukee Parental Choice plan provides up to $2,500 per child, *see supra* note 3, whereas President Bush's "G.I. Bill for Children" proposed to give only $1,000 per student. *Bush Voucher Offensive*, *supra* note 2, at 176.

[12] An instance where action was taken to limit the student selection process was in Runyon v. McCrary, 427 U.S. 160 (1992). In *Runyon*, the Supreme Court extended a provision of the Civil Rights Act of 1866, which generally guaranteed equality among all people, to include prohibiting private, commercially operated, nonsectarian schools from racially discriminating in their student selection process. *Id.* at 173.

[13] *See* 42 U.S.C. § 12113(c) (1988 & Supp. 1990). Section 12113(a) provides, in pertinent part, that "this title shall not prohibit a religious . . . education institution . . . from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such . . . educational institution . . . of its activities." *Id.* § 12113(a)(1); *see also* NLRB v. Catholic Bishop, 440 U.S. 490 (1979). *But see* Hill-Murray Fed. of Teachers v. Hill-Murray High Sch., 487 N.W.2d 857 (Minn. 1992) (holding that state labor relations act providing right to collective bargaining applied to lay teachers of religiously affiliated school).

[14] Joseph E. Bryson & Samuel H. Houston, Jr., The Supreme Court and Public Funds for Religious Schools: The Burger Years, 1969-1986 129 (1990) ("*Mueller [v. Allen]* has the potential to establish two public funded school systems in America: (1) a public-education system, with unchurched, minority, handicapped, and indigent students enrolled; (2) a religious-schools system, with almost all white students.").

The dearth in recent discussion of the constitutionality of private choice programs in general—and vouchers in particular—is attributable to two United States Supreme Court cases: *Mueller v. Allen* and *Witters v. Washington Department of Services for the Blind*, both of which upheld private choice schemes.[18] In *Mueller*, a 1983 tax deduction case, the Court opined that where "aid to parochial schools is available only as a result of decisions of individual parents no 'imprimatur of state approval' can be deemed to have been conferred on any particular religion, or on religion generally."[19] Three years later, in *Witters*, the Court affirmed the constitutionality of a college student's use of a state scholarship toward religious education, noting that any aid "that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients."[20] Scholars and practitioners alike have interpreted these two cases as representing the definitive answer as to the constitutionality of private choice programs.[21] Allocating public monies to private individuals who then pay the religious institutions is seen as insulating the government program from Establishment Clause infirmities.[22] Forbidden direct aid is thus transformed into permissible indirect aid. Any public monies that end up in religious coffers is simply incidental and occurs only after the private recipient has first exercised his or her "independent" choice.[23]

---

[15] Olson, *supra* note 3, at 18 ("[Ninety] percent of the private schools in the United States are religious."); *see* Mueller v. Allen, 463 U.S. 388, 391 (1983) (noting that 96% of students attending private schools in Minnesota attended sectarian schools); Wolman v. Walter, 433 U.S. 229, 234 (1977) (finding that during 1974-75, more than 96% of Ohio's non-public enrollment attended sectarian schools and more than 92% of those attended Catholic schools).

[16] *E.g.*, Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 384-85, 397 (1985) (holding that public aid for secular classes taught in religious schools violated Establishment Clause); Meek v. Pittenger, 421 U.S. 349, 357, 366, 373 (1975) (holding that state loan of textbooks to students of non-public school was constitutional, but that state loan of materials and equipment and "auxiliary services" to students in non-public schools was unconstitutional). For a discussion of "pervasively sectarian," see *infra* note 48.

[17] *See* Bowen v. Kendrick, 487 U.S. 589, 610 (1988) ("[T]here is a risk that direct government funding, even if it is designated for specific secular purposes, may nonetheless advance the pervasively sectarian institution's 'religious mission.' "); *Grand Rapids Sch. Dist.*, 473 U.S. at 381-85 ("[T]he [public assistance] may provide a crucial symbolic link between government and religion, thereby enlisting—at least in the eyes of the impressionable youngsters—the powers of government to the support of the religious denomination operating the school."); *Meek*, 421 U.S. at 366 (noting public aid may constitute a "constitutionally impermissible establishment of religion"); Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 779-80 (1973) (finding that "direct public aid has the effect, inevitably . . . to subsidize the religious mission of sectarian schools"); Hunt v. McNair, 413 U.S. 734, 743 (1973) ("Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission.").

This Article takes issue with this interpretation and seeks to resurrect the constitutional argument against private choice schemes vis a vis religious primary and secondary schools. Choice advocates, in their rush to moralize their legal interpretation, have prematurely announced the death of the Establishment Clause considerations lingering in their proposals. *Mueller* and *Witters* have been grossly overplayed, with the private choice element becoming the *sine qua non* that removes all constitutional infirmities. As a result, compelling Establishment Clause concerns continue to arise in choice programs, but fail to receive their due consideration.[24] This Article will reexamine *Mueller* and *Witters* and reassert the Establishment Clause arguments against choice plans including religious schools. While this Article is concerned primarily with refuting vouchers, its analysis is applicable to all choice proposals.

---

[18] *Mueller*, 463 U.S. at 390-404; Witters v. Washington Dep't of Serv. for the Blind, 474 U.S. 481, 483, 489 (1986).

[19] *Mueller*, 463 U.S. at 399 (quoting Widmar v. Vincent, 454 U.S. 263, 274 (1981)).

[20] *Witters*, 474 U.S. at 487.

[21] *See* C. Lee Cusenbary, Jr., Comment, *Educational Choice Legislation After* Edgewood v. Kirby*: A Proposal for Clearing Sectarian Hurdles*, 23 ST. MARY'S L.J. 269, 286-91 (1991) (discussing *Mueller* and *Witters* to demonstrate that voucher system would not violate Establishment Clause as interpreted in Lemon v. Kurtzman, 403 U.S. 602 (1971)); Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989, 1021 (1991) (comparing constitutional implications of government funding policies of abortion and religious schools; citing *Witters* to illustrate Supreme Court's recognition that allowing student to use share of tax money as subsidy at religious school does not violate Establishment Clause); Hugo F. Smart, Comment, *Tax Deductions as Permissible State Aid to Parochial Schools*, 60 CHI-KENT L. REV. 657, 658, 676-81 (1984) (interpreting *Mueller* as demonstrating the Supreme Court's reduced concern over protections of Establishment Clause by allowing state aid to sectarian schools); *c.f.* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1216-17 (2d ed. 1988).

[22] Cusenbary, *supra* note 21, at 273-74 nn.19-20 (concluding that free choice creates parental responsibility and involvement in allowing selection of child's school); McConnell, *supra* note 21, at 1021 (concluding that such "indirect aid" benefits society in that families have more choices and can thus obtain education closely tailored to their preferences); Smart, *supra* note 21, at 678-79 (criticizing Supreme Court's description of aid as attenuated because it is available to parents rather than schools).

[23] Cusenbary, *supra* note 21, at 273-74, 293; McConnell, *supra* note 21, at 1021; Smart, *supra* note 21, at 678.

I. BACKGROUND

Since 1947, the United States Supreme Court and lower courts have closely scrutinized all programs that have directly or indirectly involved government in the sponsorship or fiscal support of religious and parochial schools.[25] Courts have been acutely aware of what the High Court has termed the "sensitive relationship between government and religion in the education of our children."[26] As a general rule, the Supreme Court has struck down programs that use public monies to support religiously based education.[27]

---

[24] The Supreme Court recently decided a case raising private school choice issues. *See* Zobrest v. Catalina Foothills Sch. Dist., 61 U.S.L.W. 4641 (U.S. June 18, 1993). For a discussion of *Zobrest*, see *infra* notes 153-62 and accompanying text.

[25] *See* Everson v. Board of Educ., 330 U.S. 1, 2, 17-18 (1947) (holding that First Amendment did not prohibit state from reimbursing parents of parochial school children for school bus fares).

[26] Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 383 (1985) (noting further that "[t]he government's activities in this area can have a magnified impact on impressionable young minds, and the occasional rivalry of parallel public and private school systems offers an all-too-ready opportunity for divisive rifts along religious lines in the body politic").

[27] Aguilar v. Felton, 473 U.S. 402, 402-03 (1985) (holding that state program that used federal funds to pay salaries of public school employees who taught in parochial schools violated Establishment Clause); *Grand Rapids Sch. Dist.*, 473 U.S. at 375, 381-98 (providing class to non-public school students at public expense violated Establishment Clause). *See generally* Wolman v. Walter, 433 U.S. 229, 255 (1977) (holding unconstitutional the use of public monies to purchase educational materials, equipment, and field trips for sectarian schools); Meek v. Pittenger, 421 U.S. 349, 362-73 (1975) (holding that state loan of materials and equipment to sectarian school was unconstitutional, along with state provision of "auxiliary services" to students in schools); Sloan v. Lemon, 413 U.S. 825, 825 (1973) (holding that state law that provided funds to reimburse parents for part of tuition expenses incurred in sending their children to non-public schools violated Establishment Clause); Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (holding program involving maintenance and repair expenses, tuition reimbursement, and income tax benefit was unconstitutional); Levitt v. Committee for Pub. Educ. and Religious Liberty, 413 U.S. 472 (1973) (finding appropriations to non-public schools for testing and record keeping violated Establishment Clause); Lemon v. Kurtzman, 403 U.S. 602, 606-11, 614-22 (1971) (finding "excessive entanglement" between government and religion where state aid was given to religious schools to teach secular subjects). *But see* Committee for Pub.

This rule has rested on several well-founded assumptions. First, the Supreme Court has recognized that public support for religious instruction is inherently coercive and thus antithetical to notions of religious liberty.[28] Forced taxation in support of religious institutions was a precipitating factor in the creation of the First Amendment to the United States Constitution and the complementary state constitutional equivalents.[29] James Madison proposed the federal First Amendment in large part as a result of his experience in Virginia battling Patrick Henry's Bill for Religious Assessments.[30] In his famous "Memorial and Remonstrance," Madison decried the "authority which can force a citizen to contribute three pence only of his property for the support of any one establishment."[31] Madison considered the power to assess taxes for religious purposes a "signal of persecution [that] degrades from equal rank of Citizens all those whose opinions in Religion do not bend to those of Legislative authority."[32] Later, while serving as President, Madison vetoed a congressional act that would have delegated to a District of Columbia church the authority to educate local poor children.[33] Consequently, Madison believed that public financial support for religious institutions, including religious schools, violated the Establishment Clause.[34]

Thomas Jefferson, also a moving force behind the creation of the First Amendment, concurred with Madison's views, adding that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical."[35] Forc-

---

Educ. and Religious Liberty v. Regan, 444 U.S. 646, 648 (1980) (upholding constitutionality of statute authorizing use of public funds to reimburse private religious schools for their performance of various testing and reporting services required by state law).

[28] Lee v. Weisman, 112 S. Ct. 2649, 2655 (1992) ("[T]he Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which establishes a state religion or religious faith, or tends to do so."); *Grand Rapids Sch. Dist.*, 473 U.S. at 385 ("[I]ndoctrination, if permitted to occur, would have devastating effects on the right of each individual voluntarily to determine what to believe . . . free of any coercive pressures from the state.").

[29] THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM: ITS EVOLUTION AND CONSEQUENCES IN AMERICAN HISTORY 109-37 (Merrill D. Peterson & Robert C. Vaughn eds., 1988).

[30] *Id.*

[31] CHURCH AND STATE IN AMERICAN HISTORY 69 (John Wilson & Donald Drakeman eds., 1987).

[32] *Id.* at 71.

[33] James Madison, Veto Messages to Congress (Feb. 21, 1811), *in* JAMES MADISON ON RELIGIOUS LIBERTY 79, 79 (Robert S. Alley ed., 1985).

[34] *Id.* at 68-72, 79-80.

[35] Thomas Jefferson, Act for Establishing Religious Freedom, *in* JAMES MADISON ON RELIGIOUS LIBERTY, *supra* note 33, at 60, 60.

ing a citizen to support even his own church, according to Jefferson, would deprive him of his "comfortable liberty."[36] Thus, Madison and Jefferson opposed all assessments for the support of religion, even those that tended to be noncoercive.[37] As Professor Laycock has conclusively demonstrated, the Framers also rejected the concept of nonpreferential aid that would benefit all religions equally.[38] In *Everson v. Board of Education*, the first true "parochiaid" case, Justice Black expounded on this basis for the First Amendment by noting that the Founders believed that any form of religious assessment, regardless of the size, offended the Establishment Clause, as well as notions of religious liberty and freedom of conscience.[39] As Justice Black summarized, the Establishment Clause means, at a minimum, that:

> [n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.[40]

With the dissolution of the last state establishment in 1833, direct public support for religious worship and church ministries became a legal non-issue.[41] Only the most reactionary observers would argue that the Establishment Clause permits such appropriations.[42] Consequently, it has usually been within the context of public aid to religious auxiliaries—in particular, religious schools—that the religious funding issues have occurred.

---

[36] *Id.*

[37] *See* Lee v. Weisman, 112 S. Ct. 2649, 2668-70 (1992) (Souter, J., concurring).

[38] Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875, 878-83 (1986) (describing how Framers of Establishment Clause rejected any government conduct that either encouraged or discouraged religious belief or practice).

The Establishment Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend 1.

[39] Everson v. Board of Educ., 330 U.S. 1, 8-13 (1946).

[40] *Id.* at 16; *accord* Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 381 (1985).

[41] Texas Monthly v. Bullock, 489 U.S. 1 (1989) (disallowing sales tax exemption for religious publications when no broader secular purpose was shown); Torcaso v. Watkins, 367 U.S. 488 (1961) (prohibiting religious tests as a qualification to hold appointive public office); Society of Separationists v. Herman, 959 F.2d 1283 (5th Cir. 1992) (forbidding court to require religious oaths for service as juror); Doe v. Village of Crestwood, 917 F.2d 1476 (7th Cir. 1990) (prohibiting village sponsorship of Mass).

[42] The primary exception to this rule is the area of religiously based social service entities that are entitled to participate in otherwise neutral programs. *See* Bowen v. Kendrick, 487 U.S. 589, 593, 622 (1988) (rejecting facial attack on Adolescent Family Life Act where the Act stated that public aid may be distributed to religious groups to address issues related to teen pregnancy); Mark E. Chopko, *Religious Access to Public Programs and Government Funding*, 60 GEO. WASH. L. REV. 645, 654, 660-61 (1992) (describing struggle between state and religious organizations for control of fundamental social services); Carl H. Esbeck, *Government Regulation of Religiously Based Social Services: The First Amendment Considerations*, 19 HAST. CONST. L.Q. 342 (1992).

Conflict over public funding of religious education is not new. The first controversy over parochial school aid occurred in New York City during the 1840s, with the issue resurfacing throughout the nineteenth century.[43] The often misunderstood Blaine Amendment of 1876 was proposed in direct response to the explosive "School Question" of the day.[44] Around the turn of the century, most states had prohibited the expenditure of public funds for religious schools either by constitutional provision or by statute.[45] Nevertheless, in many parts of the country, parochial schools continued to receive indirect public support through circuitous means.[46] When the Supreme Court entered the fray over parochial aid in the 1940s, legal authority for the Court's future holdings already existed, although the slate was far from clean.

Building on this long history, the High Court has recognized that while religious schools make an important contribution to the overall education of the nation's children, they exist primarily as arms of religious ministries.[47] The vast majority of religious and parochial schools are considered "pervasively sectarian," in the sense that the

---

[43] *See generally* VINCENT P. LANNIE, PUBLIC MONEY AND PAROCHIAL EDUCATION (1968) (arguing that New York school controversy of 1840-42 engendered system of parochial schools fostered by Catholic dioceses nationwide); DIANE RAVITCH, THE GREAT SCHOOL WARS (1974) (examining history of New York City school system from 1805-1973 and noting how public schools have been battlefield for social change).

[44] Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38, 41, 53 (1992) (discussing 1875 proposed constitutional amendment that would have applied First Amendment's religion clauses directly to state actions to prohibit disbursement of public funds to parochial schools).

[45] Early state cases held that public aid to parochial schools violated nonestablishment. Cook City v. Chicago Indep. Sch., 18 N.E. 183 (Ill. 1888); St. Mary's Indep. Sch. v. Brown, 45 Md. 310 (1876); Public Sch. No. 6 v. Taylor, 240 N.W. 573 (Neb. 1932); Smith v. Donahue, 195 N.Y.S. 715 (App. Div. 1922); Roman Catholic Orphan Asylum v. Board of Educ., 13 Barb. 400 (N.Y. 1851); State *ex rel.* Nevada Orphan Asylum v. Hallock, 16 Nev. 373 (1882); Synod v. State, 50 N.W. 632 (S.D. 1891); Dorner v. School Dist. No. 5, 137 Wis. 147 (1908).

[46] *See supra* note 34 and accompanying text; *see also* Everson v. Board of Educ., 330 U.S. 1, 16 (1946) (involving state funds being used to pay bus fares for parochial school children); ALVIN W. JOHNSON, THE LEGAL STATUS OF CHURCH-STATE RELATIONS IN THE UNITED STATES 148-56 (1934).

[47] According to the Court:

> "This pervasive [religious] atmosphere makes on the young student's mind a lasting imprint that the holy and transcendental should be central to all facets of life. It increases respect for the church as an institution to guide one's total life adjustments and undoubtedly helps stimulate one's total life adjustments and undoubtedly helps stimulate interest in religious vocations. . . . In short, the parochial school's total operation serves to fulfill both secular and religious functions concurrently, and the two cannot be completely separated. Support of any part of its activity

secular education "goes hand in hand with the religious mission" of the schools,[48] which is the primary reason for their existence.[49] As the New Hampshire Supreme Court noted several years ago:

> [Parochial schools] are an integral part of a religious organization and an important purpose of these schools is to advance the aims and purposes of the Church and its ministry through religious education as part of the regular program of instruction. Any financial aid to the schools is of necessity therefore aid to the Church and to the teaching of religion.[50]

In a detailed consideration of the issue, the United States Supreme Court in *Meek v. Pittenger* stated that "[t]he very purpose of many of those schools is to provide an integrated secular and religious education; the teaching process is, to a large extent, devoted to the inculcation of religious values and belief."[51] As a rule, reli-

---

> entails some support of the disqualifying religious function of molding the religious personality of the young student."

Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 391-92 (1985) (quoting Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part II. The Nonestablishment Principle*, 81 HARV. L. REV. 513, 574 (1968)).

[48] *Id.* at 384 (quoting Lemon v. Kurtzman, 403 U.S. 602, 657 (1971)). The Supreme Court has defined "pervasively sectarian" schools as those that:

> include prayer and attendance at religious services as a part of their curriculum, are run by churches or other organizations whose members must subscribe to particular religious tenets, have faculties and student bodies composed largely by adherents of the particular denomination, and give preference in attendance to children belonging to the denomination.

Id. at 384 n.6; *accord* Meek v. Pittenger, 421 U.S. 349, 366 (1975) (quoting Hunt v. McNair, 413 U.S. 734, 743 (1973), in noting that in pervasively sectarian schools, "religion is so pervasive that a substantial portion of . . . functions are subsumed in the religious mission"); Minnesota Fed'n of Teachers v. Nelson, 740 F. Supp. 694, 714 n.3 (D. Minn. 1990) (listing detailed description of factors used in determining whether an institution is pervasively sectarian).

[49] In *Essex v. Wolman*, a federal district court stated:

> The basic purpose of denominational education is to foster and maintain the teachings of a denominational religion. The religious aspect of the curriculum must be the principal and dominant reason for the existence of such schools.

342 F. Supp. 399, 419 (S.D. Ohio 1972), *aff'd*, 409 U.S. 808 (1972).

[50] Opinion of the Justices, 233 A.2d 832, 834 (N.H. 1967).

[51] *Meek*, 421 U.S. at 366. Father Christopher O'Toole has written:

> The purpose of the parochial school is to permeate with the Faith and the spirit of the Gospels the total educative process. In a parochial school the teaching of religion, for example, is not simply just another subject to be learned and which is not taught in the public schools. No, the entire curriculum is to move forward in an atmosphere of faith in order to produce a pupil who knows, at least in an elementary way, how to relate all knowledge to its ultimate source—God himself.

Christopher O'Toole, *Why Catholic Schools*, NAT'L CATH. REG., Aug. 6, 1972, at 8.

Indications are that many religious schools are reemphasizing their religious character. In February 1993, Cardinal James A. Hickey called on Catholic schools to reemphagious schools teach from a religiously centered worldview and promote conservative norms on issues such as abortion and the role of women. Most religious schools also require students to attend religious worship services and courses on religious doctrine. Within these institutions, the two functions—religious and pedagogical—"are inextricably intertwined" such that they become inseparable.[52] Benign attempts at funding only the secular functions of such schools are usually doomed to failure; public support for sectarian schools amounts to support for the religious mission of the sponsoring institutions. In the Court's words, "Substantial aid to the educational function of such schools, accordingly, necessarily results in aid to the sectarian school enterprise as a whole."[53] This distinction between pervasively sectarian and nonsectarian, or secular, schools has been criticized as resting on outdated concepts and as discriminating against the sectarian schools.[54] Others have criticized the Court's use of the term "sectarian" as having pejorative connotations and a prejudicial impact.[55] Nonetheless, even conservative scholars acknowledge that one of the primary goals of religious schools is the integration of religion and religious values into the overall educational curriculum.[56] And the Supreme Court, in none other than the personage of Chief Justice Rehnquist—no fan of the *Lemon* test[57]—has affirmed the use of the concept for determining

---

size evangelism and institute changes in the curriculum, teacher training, and extracurricular activities to reflect the Catholic perspective; similarly, Peoria, Illinois Bishop John J. Myers has issued a pastoral letter calling for greater concentration on Catholic doctrine and mandatory religious testing for all students attending Catholic schools. *See Bishop Urges Flock to Use Church Schools*, CHAMPAIGN NEWS GAZETTE, Jan. 30, 1993, at A1; *Catholic Schools Told to Put Faith at Center*, WASH. POST, Feb. 4, 1993, at B7.

[52] *Grand Rapids Sch. Dist.*, 473 U.S. at 384 (quoting *Lemon*, 403 U.S. at 657).

[53] Wolman v. Walter, 433 U.S. 229, 250 (1977) (quoting *Meek*, 421 U.S. at 366); *accord Opinion of the Justices*, 233 A.2d at 834.

[54] *See* Chopko, *supra* note 42, at 657-58; McConnell, *supra* note 21, at 1020. *See generally* Timothy S. Burgett, Note, *Government Aid to Religious Social Services Providers: The Supreme Court's "Pervasively Sectarian" Standard*, 75 VA. L. REV. 1077 (1989) (arguing that Establishment Clause standard does not work in cases involving the provision of social services by religious institutions and advocating new standard based on legitimate secular function).

[55] Richard A. Baer, *The Supreme Court's Discriminatory Use of the Term "Sectarian*,*"* 6 J.L. & POL. 449 (1991) (criticizing Supreme Court's use of equation "religious = sectarian" as connoting that which is parochial, narrow, bigoted, or idiosyncratic and as contributing to Court's inability to resolve questions about how religion relates to public life).

[56] McConnell, *supra* note 21, at 1019; O'Toole, *supra* note 49, at 8.

[57] Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). *Lemon* established a three-part test for evaluating Establishment Clause challenges: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion." *Id.*

the propriety of public aid to religious organizations. As he stated recently in *Bowen v. Kendrick*, "One way in which direct government aid might have [the impermissible effect of advancing religion] is if the aid flows to institutions that are 'pervasively sectarian.' "[58]

Acknowledging the sectarian character of religious schools only begins the constitutional inquiry. While the Court has consistently held that the payment of fungible dollars to parochial schools is forbidden because the funds can be used for religious education, it has occasionally allowed for limited forms of "ideologically neutral" aid.[59] One key question for the Court has always been whether the public aid is restricted to secular educational uses or is unrestricted and "divertable" for religious uses.[60] This distinction helps explain the often inextricable line of decisions that have upheld the loan of public school textbooks to parochial students, but excluded loans of manipulatable instructional materials and teaching aids.[61] In those limited instances where the Court has upheld aid for religious schools, it has always been with the assurance that the public monies were funding only those components that were identifiably secular. This also explains the Court's flat ban on appropriations of fungible public monies to religious schools: unrestricted grants may be used to fund both religious and secular functions of the sectarian schools.[62] Moreover, while the Court has been more likely to uphold in-kind assistance to students rather than direct contributions to religious schools, it has not blindly approved all such forms of indirect assistance. Importantly, the Court has been willing to look beyond the child as the stated recipient to examine the true beneficiary of the aid. Programs that have utilized this fiction of the student or parent as the beneficiary have been struck down as violative of the Establishment Clause.[63]

---

[58] Bowen v. Kendrick, 487 U.S. 589, 610 (1988) (quoting Hunt v. McNair, 413 U.S. 734, 743 (1973)). In fact, in *Bowen*, Chief Justice Rehnquist relied on a distinction between the religiously run family planning centers and religious schools, noting that there was "no reason to assume that the religious organizations which may receive grants are 'pervasively sectarian' in the same sense as the Court has held parochial schools to be." *Id.* at 616. Apparently, Justices Scalia and Kennedy reject the pervasively sectarian designation and would focus solely on the purported uses for the public funds. *See id.* at 624-25.

[59] *See, e.g.*, Wolman v. Walter, 433 U.S. 229, 248-49 (1977) (holding as constitutional the public funding of secular textbooks to all students).

[60] *Id.*

[61] *Id.* at 237-38, 248-49; Meek v. Pittenger, 421 U.S. 349, 359-66 (1975) (noting that "the books provided will be used [only] for . . . purely secular purposes," but for "[materials and equipment] it would simply ignore reality to attempt to separate secular educational functions from the predominantly religious role performed by many . . . church-related elementary and secondary schools").

It is important to note that both *Everson* (bussing) and *Allen* (textbooks) were decided before the Court adopted the pervasively sectarian doctrine. In *Wolman* and *Meek*, the Court upheld the textbook loan programs based on this prior authority, notwithstanding the apparent inconsistencies in the holdings. *See Wolman*, 433 U.S. at 256-60 (Marshall, J., concurring and dissenting); *Meek*, 421 U.S. at 376-85 (Brennan, J., concurring and dissenting).

[62] Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 780 (1973).

The Court has additionally been wary of the effect that funding of religious schools has on the local communities involved. At one level, public funding of religious schools conveys an impermissible message of governmental approval of religion by fostering a close identification of official powers and obligations with the entity that seeks to inculcate specific religious doctrines through its schools.[64] This concern over endorsement is especially acute in the area of primary and secondary education, where "many of the citizens perceiving the governmental message are children in their formative years."[65] The Court has also recognized that the process of implementing such aid programs often leads to excessive entanglement between government and religion, as well as invites political divisiveness within the local communities.[66] Government must oversee all aid programs to ensure that the monies do not go to sectarian uses, inviting evaluation and review of religious institutions. Additionally, public funding issues have tended to spark religious discord, a factor of great concern to the Framers. The Court has acknowledged that "the occasional rivalry of parallel public and private school systems offers an all-too-ready opportunity for divisive rifts along religious lines in the body politic."[67] Recently, the Court

---

[63] Sloan v. Lemon, 413 U.S. 825, 829, 834-35 (1973) (law purporting to reduce burden on public schools); *Nyquist*, 413 U.S. at 780-81 (holding indirect aid still violates Establishment Clause); *see also Wolman*, 433 U.S. at 249 n.16 (finding no meaningful distinction between equipment used on collective basis and that individually used by student).

[64] Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 389 (1985) ("If this identification conveys a message of government endorsement or disapproval of religion, a core purpose of the Establishment Clause is violated.").

[65] *Id.* at 390. The Court has held that prayers offered at the beginning of a legislative session are not in violation of the Establishment Clause. *Id.* at n.9 (citing Marsh v. Chambers, 463 U.S. 783, 795 (1983)). On the other hand, a similar prayer offering has been struck down when it opens a school day for children. *Id.* (citing School Dist. of Abington Township v. Schempp, 374 U.S. 203, 205 (1963); Engel v. Vitale, 370 U.S. 421, 422, 436 (1962)).

[66] Aguilar v. Fenton, 473 U.S. 402, 410-413 (1985); *Nyquist*, 413 U.S. at 794-98; Lemon v. Kurtzman, 403 U.S. 602, 622-24 (1971) ("[P]olitical division along religious lines was one of the principal evils against which the First Amendment was intended to protect.").

[67] *Grand Rapids Sch. Dist.*, 473 U.S. at 383. In *Board of Education v. Allen*, Justice Black noted:

> The First Amendment's prohibition against governmental establishment of religion was written on the assumption that state aid to religion and

reaffirmed divisiveness as an important consideration in Establishment Clause cases.[68]

Thus, while the Court has upheld aid programs that are facially neutral, generally available, and directly benefit students (e.g., busing, textbooks, standardized tests),[69] it has struck down other programs that have benefitted sectarian schools in more than an incidental manner, have led to governmental involvement or oversight in the schools, or have created an imprimatur of governmental support for religion (e.g., public teachers for remedial and enrichment courses, teacher salary supplements, instructional materials and equipment, field trips, maintenance and repair grants, tuition supplements).[70]

This "limited aid" position does not represent judicial hostility toward religion, but instead evinces true "constitutional neutrality," with the government neither advancing nor inhibiting religious education.[71] As noted above, the Court has long recognized the important role that religious schools play in American education, as well as the right of parents to choose between public schools and avail-

---

> religious schools generates discord, disharmony, hatred, and strife among our people, and that any government that supplies such aids is to that extent a tyranny.

392 U.S. 236, 254 (1968) (Black, J., dissenting).

[68] Lee v. Weisman, 112 S. Ct. 2649, 2655-56 (1992).

[69] Committee for Pub. Educ. and Religious Liberty v. Regan, 444 U.S. 646, 648 (1980) (public funding of standardized test administration by church-sponsored and secular non-public schools); *Allen*, 392 U.S. at 248 (textbooks); Everson v. Board of Educ., 330 U.S. 1, 1 (1946) (transportation).

[70] *Grand Rapids Sch. Dist.*, 473 U.S. at 375-77, 397 (holding that public teachers for "remedial" and "enrichment" courses in non-public school created a "symbolic union of church and state . . . [that] threaten[ed] to convey a message of state support for religion to students and to the general public"); *Aguilar*, 473 U.S. at 404 (holding that federal funds to teachers in parochial schools unconstitutional); Wolman v. Walter, 433 U.S. 229, 255 (1977) ("[W]e hold constitutional those portions of the Ohio statute authorizing the State to provide nonpublic school pupils with books, standardized testing and scoring, diagnostic services, and therapeutic and remedial services. We hold unconstitutional those portions relating to instructional materials and equipment and field trip services."); Meek v. Pittenger, 421 U.S. 349, 359-66 (1975) (holding that state provision of "auxiliary services" and instructional materials and equipment was unconstitutional); *Nyquist*, 413 U.S. at 798 (invalidating maintenance, repair, tuition reimbursement and income tax return program); *Lemon*, 403 U.S. at 607-10 (invalidating salary supplements for teachers of secular subjects and reimbursement for "secular educational services," including teachers' salaries, textbooks and instructional materials).

[71] *Wolman*, 433 U.S. at 251 n.18; *see also*, Walz v. Tax Comm'n, 397 U.S. 664, 669-70 (1970) ("Adhering to the policy of neutrality that derives from an accommodation of the Establishment and Free Exercise Clauses has prevented the kind of involvement that would tip the balance toward government control of churches or governmental restraint on religious practice.").

able sectarian alternatives.[72] As Chief Justice Burger remarked in *Lemon v. Kurtzman*, "[N]othing we have said can be construed to disparage the role of church-related elementary and secondary schools in our national life. Their contribution has been enormous."[73] This right to educate one's children through private religious schools, however, is not unlimited and does not extend to any legal interest in public school funds for private education.[74] Chief Justice Burger's statement in *Norwood v. Harrison* clearly delineates the limits to the *Pierce/Yoder* rule:

> In [*Pierce v. Society of Sisters*], the Court affirmed the right of private schools to exist and operate; it said nothing of any supposed right of private or parochial schools to share with public schools in state largesse, on an equal basis or otherwise. It has never been held that if private schools are not given some share of public funds allocated for education that such schools are isolated into a classification violative of the Equal Protection Clause.[75]

More recently, however, proponents of private religious choice have reasserted that government funding of religious schools may be required by the Free Exercise Clause, arguing that parents are being forced to choose between the receipt of a government benefit and their sincerely held religious belief.[76] At a minimum, this argument assumes a severe incompatibility between the individual religious belief and the public schools, as well as a close interdependency between the fulfillment of that belief and attendance at the religious schools.[77] Even assuming the sincerity of the belief and the degree of burden imposed by denying financial support for religious schools (or by "forcing" a child to attend a secular public school), the government's refusal to fund sectarian education does not rise to the level of a constitutional violation. As the Court stated in *Bowen v. Roy*:

---

[72] *See* Wisconsin v. Yoder, 406 U.S. 205, 213-14 (1972) (holding that state's responsibility for educating its citizens must "yield to the right of parents to provide an equivalent education in a privately operated system"); Pierce v. Society of Sisters, 268 U.S. 510, 518 (1925) (noting that right of parents to send their children to private and parochial schools constitutes "the very essence of personal liberty and freedom").

[73] *Lemon*, 403 U.S. at 625. As Justice Powell has noted:

> "Parochial schools, quite apart from their sectarian purpose, have provided an educational alternative for millions of young Americans; they often afford wholesome competition with our public schools; and in some States they relieve substantially the tax burden incident to the operation of public schools."

Mueller v. Allen, 463 U.S. 388, 401-02 (1983) (Powell, J., concurring in part, concurring in judgment in part, and dissenting in part) (quoting *Wolman*, 433 U.S. at 262).

[74] Recently, an Illinois trial court dismissed a complaint filed by parents alleging a right to a pro-rata share of state education funds for use at private schools. Jenkins v. Leininger, No. 92 CH 05578 (Ill. Cir. Ct. Cook County Mar. 30, 1993) (unpublished decision, on file with author). The court rejected arguments that the denial of funds violated their children's rights under the Illinois Constitution and the First and Fourteenth Amendments to the United States Constitution. *Id.*

[75] Norwood v. Harrison, 413 U.S. 455, 462 (1973); *accord* Maher v. Roe, 432 U.S. 464, 477 (1977)("We think it abundantly clear that a State is not required to show a compelling interest . . . [to] justify its election to fund public but not private education."); Brusca v. Missouri *ex rel.* St. Bd. of Educ., 332 F. Supp. 275, 279 (E.D. Mo. 1971), *aff'd.*, 405 U.S. 1050 (1972).

[76] Burgett, *supra* note 54, at 1096-1104; Chopko, *supra* note 42, at 668 n.110 (citing McDaniel v. Paty, 435 U.S. 618, 639 (1978) (Brennan, J., concurring)).

> We conclude then that government regulation that indirectly and incidentally calls for a choice between securing a government benefit and adherence to religious beliefs is wholly different from governmental action or legislation that criminalizes religiously inspired activity or inescapably compels conduct that some find objectionable for religious reasons.[78]

Government exclusion of religious schools from participation in educational funding does not evince government hostility toward religious education, but instead indicates rational policy decisionmaking that takes into account both scarce resources and the compelling Establishment Clause concerns.[79] As the Vermont Supreme Court noted several years ago:

> Considerations of equity and fairness have exerted a strong appeal to temper the severity of this mandate [denying public funds to religious schools]. The price it demands frequently imposes heavy burdens on the faithful parent. He shares the expense of maintaining the public school system, yet in loyalty to his child and his belief seeks religious training for the child elsewhere. But the same fundamental law which protects the liberty of a parent to reject the public school system in the interests of his child's spiritual welfare, enjoins the state from participating in the religious education he has selected.[80]

---

[77] *See* Mozert v. Hawkins County Pub. Sch., 827 F.2d 1058 (6th Cir. 1987), *cert. denied*, 108 S. Ct. 1029 (1988); Smith v. Board of Sch. Comm'r, 827 F.2d 684 (11th Cir. 1987).

[78] Bowen v. Roy, 476 U.S. 693, 706 (1986).

[79] *See Norwood*, 413 U.S. at 462 ("It is one thing to say that a State may not prohibit the maintenance of private schools and quite another to say that such schools must as a matter of equal protection, receive state aid."); *Maher*, 432 U.S. at 476-77 (quoting *Norwood*, 413 U.S. at 462); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 40-44 (1973) (noting that courts lack expertise on offering advice to states and legislatures on how to raise money); *accord* Healy v. Independent Sch. Dist., 962 F.2d 1304, 1306 (8th Cir. 1992).

[80] Swart v. South Burlington Town Sch. Dist., 167 A.2d 514, 520 (Vt. 1961).

Far from representing hostility toward religious schools, the public funding ban serves to protect and preserve religious education. Notwithstanding the noble intent behind many aid programs, government aid to religious schools injures the latter by leading to dependency and reliance on outside funding. Religious schools are also harmed by governmental assistance because such programs inevitably invite regulation and oversight into the administration of the schools, as well as intrusion into sacred matters.[81] The Establishment Clause, the Court has noted, "rest[s] on the belief that a union of government and religion tends to destroy government and to degrade religion."[82] Thus, this "limited aid" approach, while excluding religious schools from participating in some governmental benefits, protects the integrity and independence of the same institutions.[83]

Almost five decades ago, the Court stated that "the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."[84] Such are the considerations supporting the Supreme Court's decisions regarding public funding of religious schools, considerations that remain unresolved within the private choice context.

II. ORIGINS OF THE PRIVATE CHOICE CONCEPT

The true origins of the private choice concept are unknown. Private schools predated the creation of public "common" schools in many parts of the country and, in a few locations, public school officials elected to fund the existing private schools or pay the private school tuitions, in lieu of establishing public schools.[85] This practice has continued in several small New England towns where school boards either pay the tuitions directly or reimburse parents' expenses for attendance at nearby public or private schools.[86] These limited choice programs should be distinguished from the modern proposals, however, in that they usually operate in the absence of a local public school and only involve nonsectarian schools.

---

[81] Aguilar v. Felton, 473 U.S. 402, 410, 413 (1985) (pervasive monitoring necessitates excessive entanglement); Lemon v. Kurtzman, 403 U.S. 602, 619 (1971) ("Unlike a book, a teacher cannot be inspected *once* so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment."); *see also* School Dist. of Abington Township v. Schempp, 374 U.S. 203, 229 (1963) ("The most effective way to establish any institution is to finance it, and this truth is reflected in the appeals by church groups for public funds to finance their religious schools.") (Douglas, J., concurring).

[82] Engel v. Vitale, 370 U.S. 421, 431, 436 (1962) (holding state-directed prayer in public schools was violation of Establishment Clause).

[83] *Id.* at 431 ("The history of governmentally established religion both in England and in this country, showed that . . . many people had lost their respect for any religion that had relied upon the support of government to spread its faith.").

[84] McCollum v. Board of Educ., 333 U.S. 203, 212 (1948) (holding that state accommodation of religious instruction in public school violated Establishment Clause).

[85] 1 ANSON P. STOKES, CHURCH AND STATE IN THE UNITED STATES 642 (1950).

Proponents of private school choice often refer to the 1908 case of *Quick Bear v. Leupp* as the progenitor of the legal concept.[87] There, the United States Supreme Court upheld a congressional appropriation from a trust to provide support for religious schools on Indian reservations.[88] At first glance, the case appears analogous to private choice situations if one considers that the federal funds were "given" to the Indians, who in turn requested that they be paid to the mission schools. On closer review, however, the analogy breaks down because the money was legally Indian trust money—not public money—and the government was acting in its unique capacity as trustee.[89] In fact, the Court saw the case as raising primarily free exercise issues, not nonestablishment ones:

> [I]t seems inconceivable that Congress should have intended to prohibit [the Indians] from receiving religious education at their own cost if they desire it; such an intent would be one to prohibit the free exercise of religion amongst the Indians, and such would be the effect of the construction for which the complainants contend.[90]

Apparently, the private recipient element was also immaterial to the Court, considering its willingness to uphold a direct appropriation to a Roman Catholic hospital several years earlier.[91] In any event, it is difficult to construe *Quick Bear* as establishing the constitutional principle of private school choice.

In 1930, the Court heard *Cochran v. Louisiana State Board of Education*, a case involving a challenge to the state's purchase of textbooks for children attending public and parochial schools.[92] Rejecting the appellant's Fourteenth Amendment takings claim, the Court agreed with the Louisiana Supreme Court's determination that the true recipient of the appropriation was the school children, not the sectarian schools.[93] As Chief Justice Hughes noted, "It was for their benefit and the resulting benefit to the state that the appropriations were made."[94] Thus was born the "child benefit" theory that was later used to uphold reimbursements for student bus rides to parochial schools and the loan of secular textbooks to parochial school students under the aegis of the First Amendment.[95] So long as the children could be considered the true recipient of the neutral, nonideological aid, the program survived constitutional challenge. As the Court later noted, "[N]o funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools."[96]

---

[86] *See id.* at 642-741.

[87] 210 U.S. 50 (1908). The suit challenged a contract between the Commissioner of Indian Affairs and the St. Francis Mission Boarding School on the Rosebud Sioux Reservation. *Id.*

[88] *Id.* at 77-82.

[89] *Id.* at 80 (noting that "Treaty funds" were not similar to public funds).

[90] *Id.* at 82.

[91] Bradfield v. Roberts, 175 U.S. 291 (1899). In *Bradfield*, the Court held that despite the "controlling influence" of the Roman Catholic Church, the secular nature of the incorporated hospital removed any constitutional infirmities. *Id.* at 298-99 ("It is simply the case of a secular corporation being managed by people who hold to the doctrine of the Roman Catholic Church, but who nevertheless are managing the corporation according to the law under which it exists.").

[92] 281 U.S. 370 (1930).

Since its inception, the child benefit theory has been criticized by judges and scholars alike.[97] Taken to its logical conclusion, a focus on children as the only true beneficiaries would sanction almost any type of aid, including tuition payments and maintenance and repair grants to the religious schools.[98] Justice Rutledge's observation that assistance to students inevitably provides aid and encouragement to the religious schools still makes sense.[99]

---

[93] *Id.* at 375 ("The school children and the state alone are the beneficiaries.").

[94] *Id.* Chief Justice Hughes further noted that:

> True, these children attend some school, public or private, the latter, sectarian or nonsectarian, and that the books are to be furnished them for their use, free of cost, whichever they attend. The schools, however, are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation, because of them. The school children and the state alone are the beneficiaries.

Id.

[95] Board of Educ. v. Allen, 392 U.S. 236, 238 (1968); Everson v. Board of Educ., 330 U.S. 1, 18 (1947).

[96] *Allen*, 392 U.S. at 243-44.

[97] *See* Meek v. Pittenger, 421 U.S. 349, 374-85 (1975) (Brennan, J., dissenting) ("[C]learly, in the context of application of the factor of political divisiveness, it is wholly irrelevant whether the loan is to the children or to the school."); *Allen*, 392 U.S. at 250-54 (Black, J., dissenting); *Everson*, 330 U.S. at 24 (Jackson, J. dissenting) ("It is of no importance in this situation whether the beneficiary of this expenditure of tax-raised funds is primarily the parochial school and incidentally the pupil, or whether the aid is directly bestowed on the pupil with indirect benefits to the school."); *id.* at 29-63 (Rutledge, J., dissenting) (noting that one cannot circumvent Establishment Clause by characterizing money in different manner); California Teachers Ass'n v. Riles, 632 P.2d 953, 960 (Cal. 1981) ("If the fact that a child is aided by an expenditure of public money insulates a statute from challenge, constitutional proscriptions on state aid to sectarian schools would be virtually eradicated."); Visser v. Nooksack Valley Sch. Dist., 207 P.2d 198 (Wash. 1949); State v. Nusbaum, 115 N.W.2d 761 (Wis. 1962); Note, *Public Funds for Sectarian Schools*, 60 HARV. L. REV. 793, 799-800 (1947) (analyzing *Everson* as having opened door to provision of state funds to sectarian schools and proposing that question had become what particular benefits would be made available to sectarian schools).

Nevertheless, the type of assistance upheld in *Everson* and *Allen* represents a fundamentally distinct form of benefit than provided under private choice proposals. In both cases the aid—transportation and secular textbooks—were ideologically neutral and not divertable for any religious uses. Moreover, both transportation and textbooks were available to all school children, public and private alike. The tangible nature of those forms of assistance distinguishes them from grants of fungible monies that may be applied to myriad uses, including the furtherance of religious education, that is present in most private choice proposals.

III. Modern Private Choice Development

Two cases should inform all inquiry, as well as direct any determination, as to the constitutionality of private choice programs: *Committee for Public Education and Religious Liberty v. Nyquist* and *Sloan v. Lemon*.[100] *Nyquist* and *Sloan*, decided on the same day in 1973, dealt with several New York and Pennsylvania programs that provided for, among other things, tuition tax credits/benefits and tuition reimbursements for parents who sent their children to private schools.[101] Under the *Nyquist* tax credit/benefit scheme, parents could subtract a designated amount from their adjusted state income tax for each tuition paid to a religious school.[102] Under the tuition reimbursement plans existing in both cases, the states repaid parents a portion of the tuition expenses incurred in sending their children to nonpublic schools.[103] Only parents of children attending private schools were eligible to participate in the programs and, in both states, an overwhelming majority of eligible children attended sectarian schools.[104]

---

[98] The more reasonable line to be drawn between acceptable and unacceptable forms of aid to parochial school students is that advocated by Justice Marshall in *Wolman* which would permit the extension of general welfare benefits but prohibit all forms of educational assistance. Wolman v. Walter, 433 U.S. 229, 259-60 (1977) (Marshall, J., concurring and dissenting).

[99] *Everson*, 330 U.S. at 48 (Rutledge, J., dissenting). As Judge Rutledge further noted:

> Payment of transportation is no more, nor is it any the less essential to education, whether religious or secular, than payment for tuitions, for teachers' salaries, for buildings, equipment and necessary materials. Nor is it any the less directly related, in a school giving religious instruction, to the primary religious objective all those essential items of cost are intended to achieve. No rational line can be drawn between payment for such larger, but not more necessary, items and payment for transportation.

Id. (Rutledge, J., dissenting).

[100] Sloan v. Lemon, 413 U.S. 825, 825-35 (1973); Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 794-98 (1973).

[101] *Sloan*, 413 U.S. at 828-32; *Nyquist*, 413 U.S. at 761-68. The New York proposal also included a provision for the maintenance and repair of private schools. *Nyquist*, 413 U.S. at 763.

[102] *Nyquist*, 413 U.S. at 764-68.

The Court struck down both types of programs as having the impermissible effect of advancing religion.[105] Initially, the Court found little practical difference, for Establishment Clause purposes, between the tuition reimbursements and the tax credits; both programs served to subsidize, if not reward, parents for educating their children in a sectarian environment.[106] According to Justice Powell in *Nyquist*:

> The qualifying parent under either program receives the same form of encouragement and reward for sending his children to nonpublic schools. The only difference is that one parent receives an actual cash payment while the other is allowed to reduce by an arbitrary amount the sum he would otherwise be obliged to pay to the state.[107]

By reimbursing or defraying parents a portion of their costs of sending their children to religious schools, the states were seeking to relieve the financial burden of religious education: "[I]n both instances the money involved represent[ed] a charge made upon the state for the purpose of religious education."[108] The programs, Powell concluded, had the unmistakable effect of "providing desired financial support for nonpublic, sectarian institutions:"[109]

> [I]nsofar as such benefits render assistance to parents who send their children to sectarian schools, their purpose and inevitable effect are to aid and advance those religious institutions.[110]

Essential to the Court's reasoning was the fact that neither program restricted its benefits to secular education; because parents could apply the benefit toward any purpose, including defraying the cost of sectarian instruction, there was "no endeavor 'to guarantee the separation between secular and religious education functions and to ensure that State financial aid supports only the former.' "[111] Accordingly, the programs were "quite unlike" other programs, such as bus transportation and school textbooks, which not only genuinely benefitted all parents of all school children, but were prescribed for clearly secular uses.[112] In the latter situations, the "benefits were carefully restricted to the purely secular side of church-affiliated institutions and provided no special aid for those who had chosen to support religious schools."[113] The benefits here, however, were completely unrestricted and could be used—and, in fact, were so designed—to pay for sectarian education.[114]

---

[103] *Sloan*, 413 U.S. at 827; *Nyquist*, 413 U.S. at 764-65.

[104] In New York, 85% of eligible children attended religious schools. *Nyquist*, 413 U.S. at 768. In Pennsylvania, the number was 96%. *Sloan*, 413 U.S. at 830.

[105] *Sloan*, 413 U.S. at 835; *Nyquist*, 413 U.S. at 794.

[106] *Nyquist*, 413 U.S. at 789 (constitutionality of program did not depend on labels; both had same effect).

[107] *Id.* at 791.

[108] *Id.*

[109] *Id.* at 783.

[110] *Id.* at 793.

Finally, the Court rejected arguments that all Establishment Clause concerns were resolved by passing the benefits through the parents, instead of giving them directly to the religious schools. Notwithstanding the programs' use of parents as the recipients of the benefits, the resulting support for religious education remained the same: "[T]he effect of the aid [was] unmistakably to provide desired financial support for nonpublic, sectarian institutions."[115] According to the Court:

> [I]f the grants are offered as an incentive to parents to send their children to sectarian schools by making unrestricted cash payments to them, the Establishment Clause is violated whether or not the actual dollars given eventually find their way into the sectarian institutions. Whether the grant is labeled a reimbursement, a reward, or a subsidy, its substantive impact is still the same.[116]

Thus, the tax credit and tuition reimbursement plans failed constitutional muster for a host of reasons. First, the aid was not generally available to all parents, but was limited to those whose children attended private schools—a disproportionate number of which were sectarian.[117] Second, the aid amounted to unrestricted grants to parents who could use the money, as was expected, to pay for sectarian education for their children. Because of their unrestricted nature, there was no guarantee the public funds would be "used exclusively for secular, neutral, and nonideological purposes."[118] Third, the programs created an incentive for parents to send their children to religious schools, thus removing the government from a position of neutrality toward religious education.[119] Finally, the Court found that disbursing the benefits through the parents had the same effect on the religious schools as aiding them directly; the funds merely passed through the parents on the way to the schools. The Court refused to get caught up in a "legalistic minuet in which precise rules and forms" govern over the reality of a program.[120]

---

[111] 413 U.S. at 783 (quoting Lemon v. Kurtzman, 403 U.S. 602, 613 (1971)).

[112] *See* Everson v. Board of Educ., 330 U.S. 1, 3 (1946) (involving bus transportation).

[113] *See* Sloan v. Lemon, 413 U.S. 825, 832 (1973) (holding program was flawed because benefit did not flow to all parents; rather, the state singled out chosen class for special economic benefit, which was unconstitutional).

[114] *Sloan*, 413 U.S. at 832 ("Whether that benefit be viewed as a simple tuition subsidy, as an incentive to parents to send their children to sectarian schools, or as a reward for having done so, at bottom its consequence is to preserve and support religion oriented institutions."); *Nyquist*, 413 U.S. at 783 (state cannot reward parents for sending children to parochial schools).

[115] *Sloan*, 413 U.S. at 832; *Nyquist*, 413 U.S. at 783.

[116] *Nyquist*, 413 U.S. at 786.

[117] *Sloan*, 413 U.S. at 832; *Nyquist*, 413 U.S. at 783.

Overall, the programs in *Nyquist* and *Sloan* contained several infirmities, any of which could have been fatal. What is most important to recognize, though, is that no one on the Court saw the private choice element as holding any special significance, and certainly no Justice saw choice as constituting any type of trump over the other factors.

The *Nyquist/Sloan* rule appeared secure until the 1983 case of *Mueller v. Allen*.[121] *Mueller* involved a Minnesota income-tax deduction for tuition, textbooks, transportation, and other expenses of students attending both public and private schools. Unlike the *Nyquist/Sloan* programs, the deduction in *Mueller* was generally available to all parents with children attending public and private schools—in fact, the Court referred to the lower court findings that substantial deductions were available to parents of public school students—and was one of many deductions available to all taxpayers.[122] In reality, however, only parents of students attending private schools could fully utilize the program, since private school tuition constituted the only significant deduction.[123] Equally significant to the dissenters was the fact that approximately ninety-six percent of the private school students attended sectarian schools.[124]

---

[118] *Sloan*, 413 U.S. at 832; *Nyquist*, 413 U.S. at 780.

[119] *Sloan*, 413 U.S. at 832; *Nyquist*, 413 U.S. at 780, 786.

[120] *Nyquist*, 413 U.S. at 790 (quoting Lemon v. Kurtzman, 403 U.S. 603, 614 (1971)). An additional factor in *Nyquist* was that the tax credit was unrelated to the amount of money actually expended by a parent for tuition. *Id.*

[121] Mueller v. Allen, 463 U.S. 388 (1983); *see also* Byrne v. Public Funds for Pub. Sch., 442 U.S. 907 (1979) (following *Nyquist/Sloan* analysis); Rhode Island Fed'n of Teachers v. Norberg, 630 F.2d 855 (1st Cir. 1980) (following *Nyquist/Sloan* analysis).

[122] *Mueller*, 463 U.S. at 391 & n.2, 396-97 (1983).

[123] *Id.* at 405, 408 (Marshall, J., dissenting). Marshall reasoned that because Minnesota public schools may only charge tuition for students accepted from outside the district (there were only 79 such students for the 1978-79 academic year), and because the "single largest expense that may be deducted under the Minnesota statute is tuition," the only real beneficiaries of the tuition tax reduction were those parents whose children attended private schools. *Id.* (Marshall, J., dissenting).

Notwithstanding that several of these factors were also present in *Nyquist* and *Sloan*, a bare majority of the Court upheld the deduction. Justice Rehnquist, writing for the majority, distinguished the tax deduction from the *Nyquist* tax credit/benefit program which, he asserted, had "actually amount[ed] to tuition grants to the parents of children attending private schools."[125] Unlike the tax credits and tuition reimbursements, the generally available tax deduction was at best an "attenuated financial benefit" more akin to the tax exemption upheld in *Walz v. Tax Commission*.[126] Of greater significance to the Court, however, was that the deduction could be applied toward educational expenses incurred by *all* parents, "including those whose children attend[ed] public schools and those whose children attend[ed] nonsectarian private schools or sectarian private schools."[127] The fact that the benefit was available to a broad spectrum of groups—as the tax exemption in *Walz*—blunted the program's religious effect, while it diffused any imprimatur of state approval of religion.[128]

Finally, Justice Rehnquist addressed the private choice aspect to the program. He noted that channeling the assistance to the sectarian schools through the parents "reduced the Establishment Clause objections," and while it was true that the deduction had the ultimate comparable effect of giving aid directly to the religious schools, any aid became available "only as a result of numerous private choices of individual parents of school-age children."[129] But

---

[124] *Id.* at 409 (Marshall, J., dissenting) ("Of the total number of taxpayers who are eligible for the tuition deduction, approximately 96% send their children to religious schools.").

[125] *Id.* at 394.

[126] *Id.* at 394, 399-400. Justice Rehnquist stated that "[t]he historic purposes of the [Establishment] Clause simply do not encompass the sort of attenuated financial benefit . . . that eventually flows to parochial schools from the neutrally available tax benefit at issue in the case." *Id.* at 400. Rehnquist further stated that the tax benefit at issue bore "less resemblance to the arrangement struck down in *Nyquist* than it [did] to assistance programs upheld in . . . prior decisions." *Id.* at 394; *see also* Walz v. Tax Comm'n, 397 U.S. 664, 672-73 (1970) (holding that Establishment Clause was not violated by property tax exemptions for religious organizations because other non-profit organizations received similar exemptions).

[127] *Mueller*, 463 U.S. at 397. Also, unlike the arbitrary tax credit, the amount of the deduction was tied to educational expenses. *Id.*

[128] *Id.* ("Just as . . the State's provision of a forum neutrally 'available to a broad class of non-religious as well as religious speakers' does not 'confer any imprimatur of state approval,' so here: '[the] provision of benefits to so broad a spectrum of groups is an important index of secular effects.' ") (alteration in original) (quoting Widmar v. Vincent, 454 U.S. 263, 274 (1981)).

[129] *Id.* at 399.

Justice Rehnquist stopped short of overturning *Nyquist* on this point. Even though the private choice aspect was a "material consideration in Establishment Clause analysis," Rehnquist wrote, it was "only one among many factors to be considered."[130]

The dissent, written by Justice Marshall, accused the majority of all but reversing *Nyquist* and *Sloan*. Initially, Marshall criticized the majority's distinction between tax credits and deductions as elevating form over substance.[131] Before *Mueller*, Marshall wrote, the Court had rejected such "formalistic distinctions," focusing instead on the " 'economic [consequences]' " of such programs.[132] Here, the economic result was the same as in *Nyquist*: the financial assistance provided to the parents had " 'an economic effect comparable to that of aid given directly to [sectarian] schools.' "[133] Marshall also noted that the benefit accruing to parents through the Minnesota program was unrestricted and would inevitably flow to the sectarian side of the educational process.[134] The fact that the deduction was technically available to parents of public school students also made little difference to Marshall. The other deductible expenses were "de minimus" when compared to the "substantial benefit" that was "available only to those parents who send their children to schools that charge tuition."[135]

Significantly, Justice Marshall did not separately address the private choice aspect of the program. Although he referred to the private choice issue throughout his opinion, it was always in conjunction with other factors.[136] The lack of a direct response,

---

[130] *Id.* (quoting Committee for Pub. Educ. and Religious Freedom v. Nyquist, 413 U.S. 756, 781 (1973)).

[131] *Id.* at 408-09 (Marshall, J., dissenting). Despite the seeming intransigence of the two opinions, however, neither the majority nor the dissent questioned the authority of *Nyquist* and *Sloan* with regard to tuition benefits and reimbursements. *See id.* at 390-404 (majority opinion); *id.* at 404-17 (Marshall, J., dissenting).

[132] *Id.* at 411-12 (Marshall, J., dissenting) (alteration in original) (quoting *id.* at 396 n.6 (majority opinion)).

[133] *Id.* (Marshall, J., dissenting) (quoting *id.* at 399 (majority opinion)). Justice Rehnquist's distinction between tax deductions and tax benefits and tuition reimbursements also is less than convincing in light of the Court's scrutiny over tax exemptions and deductions in *Regan*. *See* Regan v. Taxation With Representation, 461 U.S. 540, 544 (1983) ("Both tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system.").

[134] *Mueller*, 463 U.S. at 413 (Marshall, J., dissenting) ("[T]he assistance that flows to parochial schools as a result of the tax benefit is not restricted, and cannot be restricted, to the secular function of those schools.").

[135] *Id.* at 408-09 (Marshall, J., dissenting).

[136] For example, Justice Marshall noted:

> "The State seeks to relieve [parents of] their financial burdens sufficiently to assure that they continue to have the option to send their children to religious-oriented schools. And while the other purposes for that aid—to

BEST COPY AVAILABLE

however, should not be taken as a tacit admission of the importance of the private choice aspect; instead, Marshall saw the issue of whether the aid was direct or indirect as irrelevant when weighed against the unrestricted nature of the grant and its inevitable effect. The fact that he saw this element as making little difference to the constitutionality of the program only substantiates the secondary importance that the private choice factor played in the majority's mind, and for the ultimate resolution of *Mueller*.

Three years following *Mueller*, the Court heard the case of *Witters v. State Commission for the Blind*, which discussed whether a visually impaired student could use state financial assistance to attend a *Bible* college.[137] The aid was designed to "assist visually handicapped persons to overcome vocational handicaps and to obtain the maximum degree of self-support and self-care" and could be used in numerous academic and vocational programs.[138] Even though the student was otherwise qualified for assistance under the statute, the Washington Supreme Court held that the federal First Amendment forbade using the money for a religious program.[139]

By a surprising 9-0 vote, the United States Supreme Court reversed the Washington court and held that the Establishment Clause was not offended by applying the scholarship to the proposed program of religious study.[140] The apparent unanimity of thought among the Justices, however, only masked a division on the rationale for the decision. Writing for five Justices, Justice Marshall sought to limit the scope of the decision to the facts of the case.[141] First, the Washington scholarship was truly broad-based. The aid was "made available generally without regard to the sectarian-non-

---

> perpetuate a pluralistic educational environment and to protect the fiscal integrity of overburdened public schools—are certainly unexceptionable, the effect of the aid is unmistakably to provide desired financial support for non-public, sectarian institutions."

Id. at 407 (Marshall, J., dissenting) (quoting Committee for Pub. Educ. and Religious Freedom v. Nyquist, 413 U.S. 756, 783 (1973)).

[137] 689 P.2d 53, 56 (Wash. 1984), *rev'd*, 474 U.S. 481 (1986).

[138] *Id.*

[139] *Id.* The Washington Supreme Court did not reach the issue of the program's constitutionality under the state constitution. *Id.* at 55. On remand from the United States Supreme Court, however, the Washington Supreme Court held that applying the assistance to a religious program of study violated Article IX, section 4 of the Washington Constitution that "[a]ll schools maintained in whole or in part by the public funds shall be forever free from sectarian control or influence." Witters v. State Comm'n for the Blind, 771 P.2d 1119, 1121-22 (Wash. 1989).

[140] Witters v. Washington Dep't of Serv. for the Blind, 474 U.S. 481, 489 (1986).

[141] *Id.* at 488-89 (stressing facts of case and deciding not to address numerous other potential issues before court).

sectarian, or public-nonpublic nature of the institution involved."[142] Because the neutral aid could be applied toward a broad range of vocational and career programs, of which only a small handful could be considered sectarian, the scholarship was not skewed toward benefitting religion.[143] Consequently, unlike the situation in *Nyquist* and *Sloan*, the program was not an "ingenious plan" for channeling aid to sectarian schools; nor did it create a "financial incentive for students to undertake sectarian education."[144] Instead, Marshall wrote, any aid that ultimately flowed to sectarian institutions did so "only as a result of the genuinely independent and private choices of aid recipients."[145] Thus, based on the breadth of the class and the fact that the petitioner was truly exercising his private choice among multiple alternatives, the Court held that the program did not have the impermissible effect of advancing religion.[146]

Interestingly, Justice Marshall's opinion failed to acknowledge the authority of *Mueller*, a fact emphasized by the concurrences. At least five of the Justices believed that *Mueller* controlled the case, or at least strongly supported the decision's outcome.[147] Justice Powell, who wrote the primary concurrence, stated that only three factors were of constitutional significance: (1) the program was neutral on its face with regard to religion; (2) the program was equally available

---

[142] *Id.* at 487 (quoting Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 782 n.38 (1973)).

[143] In fact, both the majority and concurrence agreed that the petitioner was the only student who had ever sought to apply the scholarship toward a religious program. *Id.* at 488; *id.* at 491 n.3 (Powell, J., concurring).

[144] *Id.* at 488 (noting that because the aid was broad-based, any possible benefit to religious institutions would truly have to be because of an individual, not state, decision).

[145] *Id.* at 487. Interestingly, while Justice Marshall acknowledged that the unrestricted nature of such scholarship funds would normally raise Establishment Clause concerns, he saw no such violation under these particular facts. *Id.* at 489.

[146] *Id.* at 489-90. At a different level, Justice Marshall strongly implied that a different program that involved the government in multiple stages of the grant process, such as in later evaluation and review of the ultimate recipient, would violate the Constitution—notwithstanding the private choice factor. *Id.* at 486 n.3. Most private choice programs include provisions requiring the ultimate recipients to meet certain criteria regarding educational and safety standards. *Id.* This authorization for continued government oversight distinguishes choice programs from the infamous "G.I. Bill." *Id.*

[147] *Id.* at 490. (White, J., concurring) (agreeing with Justice Powell's reference to applicability of *Mueller*); *id.* (Powell, J., concurring) ("The Court's omission of *Mueller v. Allen* from its analysis may mislead courts and litigants by suggesting that *Mueller* is somehow inapplicable to cases such as this one. I write separately to emphasize that *Mueller* strongly supports the result we reach today."); *id.* at 493 (O'Connor, J., concurring) (Agreeing with Justice Powell's reference to applicability of *Mueller*). The Chief Justice and Justice Rehnquist joined with Justice Powell in concurrence. *Id.* at 490 (Powell, J., concurring).

BEST COPY AVAILABLE

to students attending public and private schools; and (3) any resulting aid to religion occurred only through the private choices of the individual student beneficiaries.[148] Powell's concurrence seemed unconcerned with the additional factors outlined by the majority, including whether the program was disproportionately skewed toward a religious constituency or created incentives for religious education.[149] So long as the neutral aid was reputedly available for all beneficiaries, those attending public and private schools alike, the program passed constitutional muster.[150]

Justice Powell's approach was supported by only two other Justices. While Justice White agreed with Powell as to the relevance of *Mueller*, he stopped short of embracing the latter's analysis.[151] Justice O'Connor, on the other hand, seemed to agree with Powell's statement of the necessary factors, but limited her concurrence to the issue of religious endorsement.[152] However, since all of the Justices—save O'Connor—joined in Marshall's opinion, it must be seen as controlling.

Recently, in *Zobrest v. Catalina Foothills School District*, the Supreme Court revisited some of the issues raised in *Mueller* and *Witters*.[153] In *Zobrest*, the school district had refused to pay sign-language services for a hearing-impaired student who attended a pervasively sectarian high school.[154] Both the district court and the United States Court of Appeals for the Ninth Circuit upheld the school district's denial, ruling that such assistance would promote the student's religious development at government expense, thereby violating the Establishment Clause.[155] In a close 5-4 decision written by Chief Justice Rehnquist, the Court reversed the Ninth Circuit and held that providing funds to pay for the petitioner's sign-language interpreter would not conflict with either the Establishment Clause or past precedent. Citing to *Mueller* and *Witters*, Rehnquist wrote that the Court has "consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit."[156]

---

[148] *Id.* at 490-92 (Powell., J., concurring).

[149] *Id.* at 491 n.3 (Powell, J., concurring). Justice O'Connor apparently agreed on these elements. *Id.* at 493 (O'Connor, J., concurring).

[150] *Id.* at 491-92 (Powell, J., concurring).

[151] *Id.* at 490 (White, J., concurring)

[152] *Id.* at 493 (O'Connor, J., concurring) (noting both the purpose and effect of statute was constitutionally acceptable).

[153] 61 U.S.L.W. 4641 (U.S. June 18, 1993). By way of full disclosure, this author filed an amicus brief before the United States Supreme Court on behalf of the respondent school district and assisted the respondent with its brief on the merits.

[154] Under the federal Individuals with Disabilities Education Act (IDEA), the school district assumes financial responsibility for providing disabled students with services necessary to meet their special educational needs. *See* 20 U.S.C. §§ 1400-1484a (1988 & Supp. 1990).

[155] Zobrest v. Catalina Foothills Sch. Dist., 963 F.2d 1190 (9th Cir. 1992), *rev'd*, 61 U.S.L.W. 4641 (U.S. June 18, 1993).

Choice proponents immediately seized upon the *Zobrest* decision as providing new support for voucher proposals.[157] But a close reading of *Zobrest* reveals that these proponents are engaged in wishful thinking. In his opinion, Chief Justice Rehnquist clearly enunciated that several factors worked together to ensure the constitutionality of providing a state-paid interpreter in the parochial school environment. First, as with *Mueller* and *Witters*, Rehnquist noted that any aid that flowed to the parochial school would occur " 'only as a result of the genuinely independent and private choices of [the] aid recipients.' "[158] But, as in those earlier cases, the Court's analysis did not end there. Rehnquist also found that the federal Individuals with Disabilities Education Act (IDEA) funds are not "skewed toward religio[us]" education, but are " 'made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institutions benefitted.' "[159] Also, because the IDEA funds paid for an identifiable neutral service—one Rehnquist held was unrelated to the teaching function—"no funds traceable to the government ever find their way into sectarian schools' coffers."[160] In essence, Rehnquist found it significant that the IDEA funds, unlike vouchers, are restricted in their application such that government monies are not used for sectarian education.

And finally, Rehnquist expressly noted that the petitioner had qualified for the assistance for reasons completely unrelated to his attendance at any particular school.[161] As in *Witters*, the triggering of the benefit was one step removed from the petitioner's enrollment in a sectarian school. By contrast, eligibility for participating in a voucher program is always contingent upon attendance at private schools which, by necessity, creates the impermissible "financial incentive for students to undertake sectarian education."[162] Importantly, Rehnquist's focus on the point of eligibility and the lack of any incentive toward sectarian education served to reaffirm the majority opinion in *Witters* and to undermine the authority of Justice Powell's concurrence.

---

[156] *Zobrest*, 61 U.S.L.W. at 4643.

[157] According to Professor Richard Myers of the University of Detroit-Mercy Law School, "[A] voucher system presents a far easier case than did *Zobrest*. . . . [I]n a voucher system, the government's involvement would end with the distribution of the funds *to the parents*, thus minimizing the symbolic link between the government and religion that is of concern to certain justices." Richard Myers, *Constitution Allows Parochial School Choice*, DET. NEWS, July 4, 1993, at 3B.

[158] *Zobrest*, 61 U.S.L.W. at 4643 (quoting Witters v. Washington Dep't of Serv. for the Blind, 474 U.S. 481, 487 (1986)).

[159] *Id.* at 4644 (quoting *Witters*, 474 U.S. at 487).

[160] *Id.*

[161] *Id.* (noting that the program "distributes benefits neutrally to any child qualifying as 'handicapped' under the IDEA, without regard to the 'sectarian-nonsectarian, or public-nonpublic nature' of the school the child attends").

Consequently, *Zobrest*, like its predecessors, identified several indispensable factors leading to a finding of constitutionality and did not rest solely on the existence of an independent private choice. Instead of presaging the advent of choice programs, *Zobrest* must be seen as reaffirming the requisite of these additional elements for any permissible choice program.

In summation, considering the holdings of *Nyquist*, *Sloan*, *Mueller*, *Witters*, and *Zobrest* as a whole, a narrow paradigm for constitutional choice programs emerges. According to the Court, public aid may flow indirectly to sectarian schools through the mechanism of third parties so long as the program in question is ideologically neutral and includes within its class of recipients students attending both public and private schools. The class of ultimate beneficiaries [schools] should be sufficiently broad so as to ensure that third-party recipients exercise genuine choices, instead of merely choosing between sectarian alternatives. The program cannot be a sham for funneling aid to sectarian schools and may not create incentives for students to undertake religious education. Under the decisions, some forms of assistance are preferable to others. At present, the most constitutionally secure type of aid is in the form of neutral and nondivertible commodities. With cash, the more indirect the public transfer, and the more attenuated the benefit to the schools—tax deductions and credits—the more likely the program will be upheld. Conversely, direct cash reimbursements or transfers of funds are prohibited because they may be applied toward religious education.[163] Significantly, neither the majority nor the dissent in *Mueller* questioned the authority of *Nyquist* or *Sloan* with regard to tuition reimbursements.[164] Whereas *Witters* involved a more direct form of financial assistance through scholarship monies, that aid occurred at the college level and, as addressed below, may have less application for primary and secondary school programs. And finally, *Zobrest*, by reaffirming the requisite of these additional factors, indicates the Court's unwillingness to deviate from this formula.

---

[162] *Id.* at 4643.

[163] *But see* Committee for Pub. Educ. and Religious Liberty v. Regan, 444 U.S. 646, 658-59 ("None of our cases requires us to invalidate these reimbursements [for state-mandated tests] simply because they involve payments in cash. . . . Of course, under the relevant cases the outcome would likely be different were there no effective means for insuring that the cash reimbursements would cover only secular services.").

[164] Two years following *Mueller*, the Court reaffirmed the portion of the *Nyquist* and *Sloan* concerning tuition reimbursements. *See* Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 394 (1985).

IV. THE MISTAKEN LEGACY OF *MUELLER* AND *WITTERS*

The above paradigm of permissible choice programs helps explain why most choice proponents have sought to elevate the choice issue to the status of being the sole determining factor. Few choice proposals—if any—have satisfied the above criteria. Instead, based on a selective reading of both *Mueller* and *Witters*, private choice advocates maintain that voucher programs are automatically constitutional because any aid that flows to religious institutions does so "only as a result of the genuinely independent and private choices of aid recipients."[165] As addressed above, this reading of *Mueller* and *Witters* is overbroad and misconstrues the nature of the holdings. Neither decision stands for the proposition that merely funneling public monies through private individuals somehow sanitizes aid of all constitutional infirmities. As the Court noted in *Witters*, "Aid may have [an impermissible] effect even though it takes the form of aid to students or parents."[166]

There is nothing in *Mueller*, *Witters*, or *Zobrest* to suggest that the private choice factor, considered atomistically, contains any inherent quality that resolves constitutional concerns. To the contrary, in other contexts courts have noted that the Constitution "does not permit the State to perform acts indirectly through private persons which it is forbidden to do directly."[167] Throughout the 1960s, the Supreme Court overturned private choice schemes set up to avoid the desegregation rulings.[168] The fact that white school boards reimbursed parents who sent their children to private segregationist academies rather than paying the tuition directly was of little constitutional significance to the Court.[169] The aid was seen as benefitting the institutions, regardless of the method of payment and the parental choice element.

---

[165] *Witters*, 474 U.S. at 487.

[166] *Id.* at 486.

[167] Poindexter v. Louisiana Fin. Assistance Comm., 275 F. Supp. 833, 835 (E.D. La. 1967), *aff'd*, 389 U.S. 571 (1968).

[168] *See, e.g.*, Louisiana Fin. Assistance Comm'n v. Poindexter, 389 U.S. 571 (1968) (affirming district court's conclusion that statute authorizing publicly funded tuition grants to students attending private schools was unconstitutional because it established and maintained system of segregated schools).

[169] *See* Green v. County Sch. Bd., 391 U.S. 430, 433 (1968) (invalidating certain "freedom of choice" plans for desegregating public schools); Griffin v. County Sch. Bd. of Prince Edward County, 377 U.S. 218, 221-24 (1964) (tuition program made every

Grove City College v. Bell, decided the year after *Mueller*, provides insight into the Court's attitude toward the private choice factor.[170] In *Grove City College*, the Court held that a private college was the "recipient" of federal financial assistance and thus subject to Title IX's nondiscrimination requirements, even though the assistance was limited to financial grants to students who in turn attended the college.[171] In so holding, the Court rejected the college's distinction between direct and indirect assistance, noting that Congress had not intended to "elevate form over substance by making the application of the nondiscrimination principle dependent upon the manner in which a program or activity receives federal assistance." Expressly referring to *Mueller* as authority, the Court declared that the economic effect of direct aid to institutions and indirect aid paid through third persons "often is indistinguishable."[172] Significantly, the Court brushed aside the fiction of the payment method and recognized that the true beneficiary of the aid was the private institution. On its own, the choice factor had little affect on the outcome. Coming so quickly on the heels of *Mueller*, *Grove City College* indicates that the Court never intended the private choice factor to absolve the government from responsibility for the ultimate uses of its monies or to serve as a trump over all other legal considerations raised by choice programs. As Justice Douglas stated thirty years ago in *School District of Abington Township v. Schempp*:

> [I]t is the use to which public funds are put that is controlling . . . .*What may not be done directly may not be done indirectly lest the Establishment Clause become a mockery.*[173]

A careful reading of *Mueller* and *Witters* also indicates that, under the *Lemon* test, the private choice factor becomes important only as it affects issues of government endorsement of religion.[174] At best,

---

child, regardless of race, eligible for public grants to attend non-sectarian private or public schools).

[170] 465 U.S. 555, 569-70 (1984).

[171] *Id.* at 566; *see* 20 U.S.C. § 1681(a) (1988) (providing that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance").

[172] *Grove City College*, 465 U.S. at 565. The Court also relied on extensive legislative findings that Congress intended recipient colleges to be covered by Title IX. *Id.* at 565-68.

[173] School Dist. of Abington Township v. Schempp, 374 U.S. 203, 230 (1963) (Douglas, J., concurring).

[174] The standard for reviewing alleged violations of the federal Establishment Clause, especially within the area of public funding of religious schools, continues to be

the funneling of aid through private individuals removes only the imprimatur of government approval; it has no effect on the issue of whether the religious institution has been advanced in an impermissible manner. In *Mueller*, the Court expressly stated that where "aid to parochial schools is available only as a result of decisions of individual parents no '*imprimatur of state approval*' can be deemed to have been conferred on any particular religion, or on religion generally."[175] Significantly, the Court never explained how the choice factor remedied the remaining constitutional concerns. Moreover, if endorsement of religion had been the only concern, then Justice Rehnquist's earlier discussion of the nature of the financial benefit would have been superfluous. Justice Marshall's decision in *Witters* also distinguished between the issues of subsidy of religion and endorsement, but found both lacking in that case.[176] Thus, resolution of the endorsement issue does not resolve issues of whether the aid, as in the form of a voucher, advances religion by subsidizing religious education and by creating incentives for children to attend sectarian schools.

This last distinction only highlights the error in most choice arguments. Private choice advocates have totally ignored the *Mueller* Court's reaffirmation of *Nyquist*—that aid disbursed to private individuals rather than to religious schools "is only one among many factors to be considered."[177] Initially, a distinction should be made between the type of aid at issue in *Mueller*, *Witters*, and *Zobrest* and that involved through voucher programs. Unlike tax deductions, which involve inverse transfers of wealth between parents and the state, vouchers take the form of actual monetary transfers to the private religious schools upon redemption from the state.[178] As mentioned, the Court in *Mueller* distinguished the "attenuated" Minnesota tax deduction from the *Nyquist* tax benefits and tuition

---

the three-part test enunciated in *Lemon v. Kurtzman*. Lee v. Weisman, 112 S. Ct. 2644, 2655 (1992) ("[W]e do not accept the invitation of petitioners and *amicus* the United States to reconsider our decision in *Lemon*."). Even though Justice Kennedy's opinion rested on a finding of coercion attendant to public school graduation prayer, it relied extensively on the Court's earlier decisions of Engel v. Vitale, 370 U.S. 421 (1962), and School District of Abington Township v. Schempp, 374 U.S. 203 (1963), the progenitors of the *Lemon* test. *Weisman*, 112 S. Ct. at 2656-61.

[175] Mueller v. Allen, 463 U.S. 388, 399 (1983) (emphasis supplied) (quoting Widmar v. Vincent, 454 U.S. 263, 274 (1981)).

[176] Witters v. Washington Dep't of Serv. for the Blind, 474 U.S. 481, 488-89 (1986).

[177] *Mueller*, 463 U.S. at 399 (quoting Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 781 (1973)).

[178] By distinguishing between direct and inverse monetary transfers, this Article does not intend to imply that tax deductions and credits are necessarily constitutional. Tax advantages that are available primarily to parents of private school students also fail the breadth and incentive factors of the decisions.

reimbursements, which it described as "tuition grants." Justice Rehnquist expressed "considerable doubt" as to the constitutionality of "outright grants to low-income parents" that did not fit within the normal tax categories.[179] Even though *Witters* involved a more direct monetary transfer, the case can be distinguished as being in line with the distinction that the Court has consistently made between colleges and elementary and secondary schools.[180] Because both public and private colleges charge tuition, financial assistance programs are truly available to all students. More than anything, however, the enormity of available programs at the collegiate level distinguishes college choice from the dearth of alternatives to the compulsory public educational system. Consequently, at the primary and secondary level, the Court has continued to adhere to the rule that aid to sectarian institutions be neutral, nonideological, and not applied to a religious purpose.[181] And finally, the aid sought in *Zobrest* was tied to the petitioner's disability and would not ever accrue to the sectarian institution.

Also inseparable from the private choice factor are issues of whether the aid is "in [any] way skewed towards religion" or whether it "creates [a] financial incentive for students to undertake sectarian education."[182] *Mueller*, *Witters*, and *Zobrest* all recognized that breadth of the recipient class is an indispensable element of any program.

The breadth factor, however, excludes most private choice proposals, which by their very nature are limited to students attending *private* schools. Justice Rehnquist did not distinguish *Mueller* from *Nyquist* on the ground that the deduction was available to parents with children attending both sectarian and nonsectarian private schools, but that the benefit was available to *all* parents with school children—those attending public and private schools alike.[183] Similarly, in *Everson* and *Allen*, the class of beneficiaries included all school children, not just those attending private schools. The Court has never held that the size of the recipient class can be limited to private schools only, the overwhelming proportion of which are sectarian.[184] This reading of *Mueller* and *Witters* is consistent with cases in other areas where the Court has permitted religious organizations to receive government benefits, but only where they were part of much larger classes.[185]

---

[179] *Mueller*, 463 U.S. at 394, 396 n.6.

[180] *Compare* Roemer v. Board of Pub. Works, 426 U.S. 736, 750 (1976) ("College students are less susceptible to religious indoctrination; college courses tend to entail an internal discipline that inherently limits the opportunity for sectarian influence; and a high degree of academic freedom tends to prevail at the college level.") *with* Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 384 n.6 (1985) (noting "elementary and secondary schools . . . differ substantially with . . . colleges"). *See also* Tilton v. Richardson, 403 U.S. 672, 686 (1971)("[B]y their very nature, college and postgraduate courses tend to limit the opportunities for sectarian influence by virtue of their internal disciplines. Many church-related colleges and universities are characterized by a high degree of academic freedom and seek to evoke free and critical responses from their students.").

[181] Bowen v. Kendrick, 487 U.S. 589, 623 (1988) (O'Connor, J., concurring) ("*[A]ny* use of public funds to promote religious doctrine violates the Establishment Clause."); *see also Grand Rapids Sch. Dist.*, 473 U.S. at 391-98.

[182] Witters v. Washington Dep't of Serv. for the Blind, 474 U.S. 481, 487-88 (1986).

Finally, most choice proposals also fail the "no-incentive" requirement. The precise purpose of voucher programs is to enable parents to enroll their children in private religious schools. Eligibility for the program and receipt of the aid is conditioned upon enrollment in private schools, the vast majority of which are religious.[186] This represents the crucial difference between choice proposals and *Witters*. Larry Witters was qualified to participate in the state scholarship program for reasons unrelated to his enrollment in the private college.[187] Unlike the situation in *Witters*, the actuality of a "genuinely independent" choice at the elementary and secondary level is nonexistent due to the lack of real alternatives and the incentive toward sectarian education. Thus, true private "choice" is a facade because of the distinct incentive to attend private religious schools. As Justice Marshall noted, if the practical effect of the aid is "limited, in large part or in whole, to students at sectarian institutions," then the "private choice" factor becomes inconsequential.[188]

---

[183] *Mueller*, 463 U.S. at 397-98 ("[T]he deduction is available for educational expenses incurred by all parents, including those whose children attend public schools and those whose attend non-sectarian private schools or sectarian private schools. . . . In this respect, . . . this case is vitally different from the scheme struck down in *Nyquist*. There, public assistance amounting to tuition grants was provided only to parents of children in non-public schools.").

[184] *Compare* Board of Educ. v. Allen, 392 U.S. 236 (1968) (statute providing for loan of textbooks to students upheld in part because it applied to all students in state) *with* Public Funds for Pub. Sch. v. Marburger, 358 F. Supp. 29, 35 (D.C.N.J. 1973) (holding statute violated Establishment Clause because books were made available only to students at non-public religious oriented schools), *aff'd*, 417 U.S. 961 (1974).

[185] *Bowen*, 487 U.S. at 600-18 (holding Adolescent Family Life Act did not violate Establishment Clause because it was statute of broad applicability); Widmar v. Vincent, 454 U.S. 263 (1981) (holding opening of forum to all student groups meant opening to religious groups as well; could not discriminatorily exempt); Walz v. Tax Comm'n, 397 U.S. 664, 672-73 (1970) (holding property tax exemptions for religious organizations did not violate Establishment Clause because a broad class of property owned by nonprofit organizations received such exemptions); *cf.* Texas Monthly v. Bullock, 489 U.S. 1 (1989).

[186] *See, e.g.*, Grove City College v. Bell, 465 U.S. 555, 565 n.13 (1984).

[187] *Accord* Zobrest v. Catalina Foothills Sch. Dist., 61 U.S.L.W. 4641, 4644 (U.S. June 18, 1993).

In response, private choice advocates argue that most voucher programs are constitutional because they are facially neutral with regard to the nature of the funds and the apparent eligibility of parents of both public and private school students. Apparent facial neutrality of a program, however, does not dispose of Establishment Clause considerations.[189] The *Lemon* test and its endorsement counterpart exist primarily to judge laws that are neutral between religion and nonreligion, but have the unconstitutional effect of advancing or endorsing religion. At best, facial neutrality merely resolves the secular-purpose prong of the test and prevents application of a strict-scrutiny analysis against arguments that a statute is expressly directed toward religion.[190] The facial neutrality aspect fails to address the other compelling constitutional concerns.

V. CONCLUSION

Through *Mueller*, *Witters*, and now *Zobrest*, the Supreme Court has held that under limited circumstances public funds may be used to indirectly support private school education. As demonstrated above, however, most choice programs fail the strictures of the Court's test. While the private choice mechanism is one element in the equation, it does not represent the *sine qua non* upon which all other factors depend. Private choice programs must still withstand the scrutiny of the Establishment Clause to determine whether religion is benefitted in an impermissible manner. The private choice aspect of *Mueller* and *Witters* has been grossly overplayed to the exclusion of these other factors, factors that are still deserving of attention by constitutional scholars and attorneys alike.

---

[188] Witters v. Washington Dep't of Serv. for the Blind, 474 U.S. 481, 488 (1986).

[189] *Bowen*, 487 U.S. at 609, 618-22 (remanding case for district court to decide if facially neutral statute was constitutional as applied).

[190] *See* Larson v. Valente, 456 U.S. 228 (1982). As the court in *Roemer v. Board of Public Works* noted:

> The Court has taken the view that a secular purpose and a facial neutrality may not be enough, if in fact the State is lending direct support to a religious activity. The State may not, for example, pay for what is actually a religious education, even though it purports to be paying for a secular one, and even though it makes its aid available to secular and religious institutions alike.

426 U.S. 736, 747 (1976).

"This arti[illegible]e is reprinted for one time use by the NSBA Coun
For more information regarding the journal Religious Educati

ELIGIOUS EDUCATION

ie Journal of the Religious Education Association and the Association of ofessors and Researchers in Religious Education

)ITOR: Jack D. Spiro, Box 2025, Virginia Commonwealth University, Richmond, Virginia 23284-2025

ANAGING EDITOR and BUSINESS OFFICE: Randolph Crump Miller, 409 Prospect Street, New Haven, Connecticut 06511-2177

)OK EDITOR: Ronald H. Cram, Presbyterian School of Christian Education, 1205 Palmyra Avenue, Richmond, Virginia 23227

:SEARCH EDITOR: David S. Steward, Pacific School of Religion, 1798 Scenic Avenue, Berkeley, California 94709

;SOCIATE EDITORS: Lee C. Barrett, Sara P. Little, Charles F. Melchert, Paul W. Walaskay

SSISTANT EDITOR: Elaine M. Jones

XECUTIVE SECRETARY, REA: Donald Russo, 145 79th Street, Brooklyn, New York 11209

ONSULTING EDITORS: Warren Benson, David C. Hester, Dwayne Huebner, Walter Jacob, Marcia McBroom Landess, Donald Russo, Jack L. Seymour, Suzanne Toton

DITORIAL COMMITTEE: Henry C. Simmons (Chairperson), Jerome Epstein, Freda Gardner, Greer Anne Ng, Padraic O'Hare (APRRE), Constance Tarasar

XECUTIVE SECRETARY, APRRE: Donald F. Williams, Chicago Cluster of Theological Schools, 1100 East 55th Street, Chicago, Illinois 60615

---

nce the Religious Association is an inter-faith organization, authors come from a wide variety of religious backgrounds: Protestant, Catholic, Jewish, Eastern Orthodox, and others. Contributors are alone sponsible for opinions expressed in their articles and book reviews. Articles in *Religious Education* are dexed and abstracted in the RELIGIOUS INDEX ONE: PERIODICALS, EDUCATION INDEX, ELIGIOUS AND THEOLOGICAL ABSTRACTS, INDEX TO JEWISH PERIODICALS, PSYHOLOGICAL ABSTRACTS, PSYC INFO., and CURRENT CONTENTS. Issues are also available i microfilm from University Microfilms, P.O. Box 1340, Ann Arbor, Michigan 48106

nnual membership dues in the Association: Professional $35.00; Contributing $50.00; Supporting '5.00; Sustaining $100.00; Donor $200.00; Full-time Students and Emeritus $17.50. Membership dues wer subscription to *Religious Education*. Add $3.00 for postage for membership in countries outside ie U.S. and Canada.

ibrary subscription without membership, to academic and municipal libraries, $35.00 ($38.00 for untries outside the U.S. and Canada). Single copies of regular issues of *Religious Education*, $9.00 ich.

9

iblished quarterly. Printed in the U.S.A.

opyright © 1998 by The Religious Education Association

ll rights reserved. No part of this publication may be reproduced or transmitted in any form or by any orm or by any means, electronic or mechanical, including photocopy, recording, or any information orage and retrieval system, without permission in writing from the REA business office.

of School Attorneys by The Religious Education [illegible]ociation.
n, visit www.religiouseducation.net."

ISSN 0000-0000

RELIGIOUS EDUCATION

Volume 84
Number 2
Spring 1989

CONTENTS

Jack D. Spiro 164 Editorial

Theme: *Eastern Religions and Religious Education*

Marianne Ferguson 165 What Eastern Religions Teach Us about Religious Education
Sunyana Graef 174 A Hair in Vast Space: Teaching and Learning in Zen
Ibrahim M. Abu-Rabi 186 Modern Trends in Islamic Education
Victoria Urubshurow 201 Tibetan Buddhist Pointers on Religious Education
Robert J. Radcliffe 215 Confucius and John Dewey

Articles

Boardman W. Kathan 232 Prayer and the Public Schools: The Issue in Historical Perspective and Implications for Religious Education Today
Donald B. Rogers 249 From Setting to Theory: Principles of Urban Church Education
Regina Coll 262 Toward A Holistic Approach to Church Education
Cora Marie Dubitsky 273 Religious Education: Profession and Academic Discipline
Timothy Rogers-Martin 283 The Power of the Surface: Andy Warhol As Artist and Teacher

BEST COPY AVAILABLE

80

PRAYER AND THE PUBLIC SCHOOLS: THE ISSUE IN HISTORICAL PERSPECTIVE AND IMPLICATIONS FOR RELIGIOUS EDUCATION TODAY

Boardman W. Kathan

229 Cheshire Road
Prospect, CT 06712

The controversy over the role of religion and public education has continued throughout the history of the United States and shows no signs of abating. Arrayed on various sides of the conflict are fundamentally different philosophies of education and sharply divided understandings of the relationship between Church and State in a modern democratic republic. Battles have been fought over prayer and Bible reading, textbooks and curriculum, religious holidays and religious symbols, evolution and creationism, released time inside and outside the school building. The landscape is littered with countless tracts, sermons, addresses, articles, books, laws, and court decisions. In every generation the contending forces have found new resolve, fresh recruits, and replenished ammunition.

This paper is an attempt to explain the persistence of the issue of school prayer and to provide a historical framework for understanding the changes in the issue over time. Why has the issue demonstrated such staying power? Whereas Bible reading has been the predominant subject through the years, why have the proposals to override the 1962-63 Supreme Court decisions been primarily prayer amendments? How has the issue of school prayer changed during the course of American history? Is the practice of prayer in the classroom as long-standing a custom or as widespread and universal as commonly assumed?

There i[illegible]arge body of literature on the subject. In the nineteenth century much of it was polemical, revolving around

Protestant-Catholic battles over the King James Version of the Bible and the division of school funds. In the last two decades the discussion has centered around the legal issues and the interpretation of the U.S. Constitution. For example, in *Religion in the Public Schools: An Introduction*, Richard C. McMillan has intentionally chosen the legal frame of reference because "in a pluralistic society, given the idea of religious liberty to which the country is constitutionally dedicated, solutions that will protect the rights of all persons can be found only in a legal context."[1] One of the best historical studies is *Piety in the Public School* by Robert Michaelsen, but the author's main interest is the attempt in different generations to find a common religion for the public schools, whether the "common Christianity" of Horace Mann or the "common faith" of John Dewey.[2] A bibliography was prepared by Albert J. Menendez, *School Prayer and Other Religious Issues in American Public Education*, but of 1,566 entries only 12 are listed under "School Prayer: History," while there are 165 listed under "School Prayer in the Courts."[3] What is lacking, even in these 12 entries, is a systematic treatment of the subject in American educational history.

Persistence Of The Issue

The issue of prayer in the public schools is one that will not go away. Since the rulings of the Supreme Court in 1962 and 1963, there have been many attempts by the Congress to amend the Constitution. The two most active leaders of this period of time were Representative Frank Becker of New York and Senator Everett Dirksen of Illinois. In 1966 the Senate lacked a two-thirds majority by nine votes, and in 1971 the House missed the two-thirds majority for an amendment by 23 votes. Undoubtedly, the best organized and most carefully orchestrated campaign was in March 1984, when 50 proamendment speakers kept the House of Representatives in a rare all-night session; when demonstrations, rallies, and prayer vigils were held at the Capitol and the Supreme Court building; when Pat Boone and other celebrities organized letter, postcard, and telephone drives; and when the Senate fi-

EST COPY AVAILABLE

---

[1] Richard C. McMillan, *Religion in the Public Schools: An Introduc*[illegible] Macon, Georgia: Mercer University Press, 1984).

nally voted on a prayer amendment, after two weeks of debate, which fell 11 votes short of the two-thirds majority required. Over 20 years after the Supreme Court decisions, the issue of school prayer is more controversial and politicized than ever before. Advocacy for an amendment was added to the platform of the Republican Party in 1980 and became part of the "social issues" agenda in the 97th and 98th Congress along with anti-abortion and anti-busing for school desegregation.

Conservative religious groups such as the National Association of Evangelicals, the re-named Moral Majority, and others have lobbied extensively for school prayer and have threatened retribution at the polls. Many Protestant and Jewish organizations are just as strongly opposed to it, along with the American Civil Liberties Union, People for the American Way, and Americans United for the Separation of Church and State. Fierce battles are being fought in the largest Protestant denomination, the Southern Baptist Convention, over the school prayer issue.

There are at least six factors that help to explain this persistence. The first is ideological. In its simplest terms the movement to "restore" prayer to the classroom is a struggle for control of the public schools of the country. This struggle is nothing new. In every generation a host of special interest groups has seen universal free education as a way of capturing the hearts and minds of the American people for a particular cause or ideology. The history of American education is full of efforts to influence classroom instruction, textbook publishing, and teacher education. Those eager to bring God and religion "back to the classroom" are seeking to rid the schools of what they perceive as a religion of secularism or secular humanism. These same individuals have a fervent, nostalgic longing for a "Christian America," God-fearing and law-abiding, and they feel that mandated or organized prayer is one way to reclaim it.

Closely related is the moral factor. People sense a loss of traditional values, a decline in discipline, a rise in crime and violence, equating these trends with the ejection of prayer and God from the schools. Moral education and character-building have always been tasks assigned to the schools; and at least since Horace Mann and the common school reform movement, there has been a healthy debate about the sources of morality and the relationship of religion to ethics, as far as American schools are concerned.

religious teaching: that was the job of the church and Sunday school. Modern attempts to make prayer a formal part of the daily classroom routine have the danger of foreclosing the debate about moral education and of offering a simplistic solution to the problems of drug abuse, alcoholism, vandalism, and teenage pregnancy.

The third factor is civil-religious. The sociologist, Robert Bellah, propounded the view that "there actually exists alongside of and rather clearly differentiated from the churches an elaborate and well-institutionalized civil religion in America."[4] This religion has its creeds and dogmas, rituals, symbols, saints, holy days, and scriptures. G. K. Chesterton could observe that "America is the only nation in the world that is founded on a creed," and he called the United States "a nation with the soul of a church."[5] The public schools have been perceived as the primary institution for the practice and inculcation of this civil religion; therefore, a major reason for the outcry against the 1962 and 1963 decisions was that it seemed to be banished from the schools. Overlooked was the fact that in these same decisions the justices recommended the use of documents, addresses, anthems, and other literature in American history where faith in God is expressed.

A fourth factor is nationalism. Since World War II the United States has been locked in a struggle with the Soviet Union for economic, political, and military supremacy. In this battle with godless, atheistic Communism, it was essential to enlist God on the side of America. This helps to explain why, at the height of the cold war in the 1950s, "under God" was added to the pledge to the flag, and "In God we trust" was adopted as the official motto of the country. Not only is prayer essential to elevate morality and to maintain our civil religion, but it is a strategic weapon to use in our conflict with the USSR. This use or mis-use of God for reasons of statecraft and international competition is frightening at the very least.

The fifth factor is political. In the two decades since the Supreme Court decisions the American people have been regularly polled on their attitude toward school prayer. The Gallup Poll has shown consistently that about 80 percent of the people support school prayer and would favor an amendment to the Constitu-

BEST COPY AVAILABLE

---

[4] Robert N. Bellah, "Civil Religion in America," *Daedalus* 96 (Winter 1967), p. 1.

tion. Not only are these figures quoted extensively in the halls of Congress, but those running for office use them for political gain. One incumbent Republican senator, challenged by a more conservative opponent, announced the day before the primary that he would vote in favor of the prayer amendment: He won the primary. We live in a day of single-issue candidates and pressure groups, and school prayer persists as an attractive platform because there is so much political mileage to be gained from it.

A sixth and final factor is that of states' rights and local control. The Constitution left matters of education to the people and the states, and the states in turn have delegated much power to school districts and their boards of education. The First Amendment prohibited only the Congress from making laws relative to the establishment of religion, and it was not until 1940 that the Supreme Court used the 14th Amendment to interpret the religion clauses in a state case. Is it any wonder that people were stunned when a simple prayer written by the New York Board of Regents was declared unconstitutional or when in 1963 Bible readings and the Lord's Prayer were declared an establishment of religion. One of the most passionate arguments for a prayer amendment is that it will return policy and decision-making to the states and school districts. One hotly debated amendment on the floor of the Senate would have removed federal court jurisdiction over school prayer cases and, if passed, could have led to 50 different interpretations of the First Amendment.

In answer to the question of why there have been persistent attempts to pass a prayer amendment rather than a Bible reading amendment, it is clear that the devotional use of the Bible is too specific, too concrete, and that a movement in this direction would break down over which translation, which testament, which passages. Prayer has more symbolic power. It is like motherhood, the flag, and apple pie: Who could be against it? It becomes a convenient rallying point for all those who are critical of humanistic and secular trends in public education. And if anyone questions the power of symbols and their manipulation, a glance at the book *Symbolic Crusade* by Joseph Gusfield would be enlightening.[8]

BEST COPY AVAILABLE

A Historical Framework

For a historical analysis of the school prayer issue, I suggest that we look at six periods of American history: 1) the colonial era; 2) the revolution era or early national period and decline of common schools; 3) the mid-nineteenth century and common school reform; 4) the late nineteenth century and the development of modern secular education; 5) the first half of the twentieth century and the era of state prayer and Bible laws; 6) the second half of the twentieth century and the era of U.S. Supreme Court decisions regarding prayer and Bible reading.

1. *Colonial Era.* School prayer was not an issue in the colonial period, since the public school, as we know it today, simply did not exist. Earlier historians like Ellwood Cubberly were fond of reciting the story of how the seeds of public schooling were planted in the seventeenth century and finally brought to glorious fruition in the nineteenth century.[7] Educational historiography has been flawed by a preoccupation with formal pedagogy and educational institutions and an attempt to find precursors of present forms in the past. Bernard Bailyn corrected these assumptions with an understanding of education "as the entire process by which a culture transmits itself across the generations." According to Bailyn, the most important agency in this process was the family, extended and formalized in apprenticeship and the local community. The church carried on a more explicit or formal educational function, but at the local level the church was coterminous with the community. In other words, the line between "private" and "public" was blurred. "The modern conception of public education," wrote Bailyn, "was unknown before the end of the eighteenth century."[8]

Churches were expected to start schools in order that everyone would be trained in literacy and therefore be able to read the Bible and not be "deluded by Satan." For example, the Congregational Church of Wilton, Connecticut, was organized in 1726 with five purposes: 1) to hold worship; 2) to recruit; 3) to train the militia; 4) to raise taxes; and 5) to educate all the children of the community. Schools in this early period were predominantly Protes-

---

[7] Ellwood P. Cubberley, *Public Education in the United States* (B[illegible]n: Houghton Mifflin Co., 1919). See also Lawrence A. Cremin, The Wonderful World of Ellwood Pat-

tant in ethos and content, and it was common for the school day to include prayers, hymns, and Bible reading. Lawrence Cremin, in his *American Education: The Colonial Experience 1607-1783*, indicated that the rules and regulations of the Hopkins Grammar School in New Haven in 1684 were typical: "The master is instructed to begin each day with a short prayer and then to set his pupils in the schoolroom according to their degrees of learning."[9] In the more Anglican colony of Virginia the teachers of the Society for the Propagation of the Gospel were enjoined, among other things, to teach the Holy Scriptures, to catechize, and to lead pupils in morning and evening prayers.[10]

By the end of the colonial period schools had assumed a new importance, and education became more "deliberate, self-conscious and explicit."[11] Cremin distinguishes three general types of institution: "the English (or petty, or common) school; the Latin grammar school; and the academy."[12] However, there was another important development by the end of this period, namely, the growth of a diversity of religious groups. Among other things, this meant that sectarian religious teachings and practices in the common schools would not go unchallenged.

2. *Revolutionary Era or Early National Period.* School prayer continued in this period as a custom or tradition in the common schools, but with less frequency, support, and favor. It is generally recognized that at the end of the eighteenth century and the beginning of the nineteenth, there was a decline in religion. According to Sydney Ahlstrom, "The revolutionary era was a period of decline for American Christianity as a whole. The churches reached a lower ebb of vitality during the two decades after the end of hostilities than at any other time in the country's religious history."[13] The Great Awakening had run its course, and the war for independence had taken its toll on churches, ministers, and church membership. In addition, there was the growth of religious rationalism (Thomas Paine had his followers in the new nation), Enlightenment ideas, and deism. Another factor was the disestablishment of the churches and the First Amendment guar-

---

[9] Lawrence A. Cremin, *American Education: The Colonial Experience 1607-1783* (New York: Harper & Row, 1970), p. 188.

[10] *Ibid.*, p. 343.

[11] Bernard Bailyn, *op. cit.*, p. 41.

[12] Lawrence Cremin, *op. cit.*, p. 500.

[13] Sydney E. [illegible]

BEST COPY AVAILABLE

antees of free exercise of religion. To those who claim that this was only to prevent a national church, the story is told of the Declaration of Religious Liberty in Virginia, supported by Madison and Jefferson, in opposition to Patrick Henry's bill to pay for Christian teachers in the schools.

There was also a decline in the common schools during this period. It is ironic that in this critical time of nation-building, with the need for an educated citizenry with republican virtues, education deteriorated. Horace Mann pointed out some reasons in the first issue of *The Common School Journal*, which he edited. Other causes and preoccupations had deflected interest in the schools, such as the revolutionary struggle, the fiscal condition of the new government, other philanthropic enterprises, and the attention given to material prosperity.[14] I believe that a major factor in this decline was the system of local control without any checks or balances. The new Constitution had left education to the people and the states. Proposals by Jefferson, Benjamin Rush, and others to organize state systems were not passed. Laws passed by state legislatures were not enforced. Local communities resisted the additional taxes and kept the decentralized district schools, resulting in a lack of supervision, accountability, financial support, and a great deal of public apathy and indifference. It is clear that, before the common school reform movement, the schoolhouses were deplorable and lacked equipment; classes were ungraded and crowded; teachers were untrained, ill-paid, and transient; libraries were unknown; and textbooks were lacking. Those who could afford it sent their children to an increasing number of private schools and academies.

Given these conditions, it is no wonder that religious instruction and religious exercises were haphazard, perfunctory, or neglected altogether. In his first annual report as Secretary of the Board in Connecticut in 1839, Henry Barnard wrote: "The whole field of moral education is almost abandoned," despite the fact that the Bible or New Testament was found in almost every school.[15] Barnard and other school reformers discovered that the Bible was used as a reading and spelling book and sometimes as a religious exercise at the opening of school. School visitors re-

---

[14] Horace Mann, "Editorial," *The Common School Journal*, vol. 1, no. 1 (Nov. 1838), pp. 2-3.

ported that in some districts there was the reciting of the Lord's Prayer and the Ten Commandments once a week, while others reported that there was prayer only when the visitors, especially clergy, were present to lead them. The purpose of education had shifted to training for morality, but the common schools were inadequate for the task.

3. *Mid-Nineteenth Century or Era of Common School Reform.* Carl Kaestle has pointed out in his writings and addresses that the traditional view of this period has emphasized the work of individuals like Mann and Barnard and has perpetuated the "great man" approach to history. In a presentation before the Connecticut Historical Society, Kaestle said

> Where the conditions were right — in much of the Midwest and even in the upcountry non-plantation South — advocates of common school systems emerged. Though they often cited Yankee authorities and even invited Barnard and Mann to their communities to give advice, one can imagine that they would have invented a public school tradition on their own even if the New England model had not been available.[16]

Conditions were ripe for the reform of the common schools beginning in the 1830s. State systems of education were created; teachers institutes and normal schools were started; textbooks were written; and a vast network of publications, speakers' bureaus, and other resources was developed.

Parallel to the reforms in education and contributing to them was the revival of religion, often called the Second Great Awakening. In their book, *Managers of Virtue: Public School Leadership in America, 1820-1980,* David Tyack and Elisabeth Hansot have demonstrated that the religious revival in the 1800s and the millenial vision of the Protestant-republican ideology laid the foundation for public schools.[17] In two "Monographs in Christian Education," Robert Lynn and Will Kennedy showed that these schools were an important part of a dual Protestant strategy in education. The purpose of the public school was to teach morality and a common Protestant Christianity, while the Sunday school was

BEST COPY AVAILABLE

---

[16] Carl Kae[illegible]Yankee Educators to the Nation: A Reassessment," *To Enlighten, Correct and Form:* [illegible]*nkee Educators to the Nation* (West Hartford, CT: Noah Webster Foundation and Historical Society, 1980), p. 17.

developed to provide the more specific teachings of the different denominations.[18]

When Horace Mann became secretary of the newly created Board of Education in Massachusetts in 1837, sectarian religious doctrine was still being taught by teachers and visiting clergy, even though the state legislature had passed a law in 1827 prohibiting sectarian textbooks. In order to develop a school system that would be open to all students and supported by the taxes of all people, he had to work out a compromise, so that the schools would be neither sectarian on the one hand or "godless" on the other. His solution was to encourage the teaching of a common morality or natural religion and to promote the reading of the Bible "without comment." Mann could not recognize the sectarian nature of the King James Version of the Bible, which was objectionable to Catholics.

In his 12th and final report as secretary in 1848, he was proud of the fact that the Bible had been restored to the schools of the state. He was relatively quiet on the matter of prayer. On a trip to Europe in 1843, he visited some Catholic schools and wrote in his journal an unfavorable comment about "the number of prayers which the children are obliged to make."[19] In his book, *Public Schools and Moral Education*, Neil McCluskey wrote that for Mann, genuine religion consisted of love for humanity, the golden rule, and the social betterment of the race: "This meant *doing* for one's fellows rather than preoccupying one's self with private prayer and worship."[20]

Henry Barnard considered Mann his mentor, colleague, and confidant, and turned to him for advice on many problems, including religion in the schools. In a letter to Barnard on June 23, 1844, the older educator included this recommendation: "The other suggestion relates to a matter which has been of late exciting considerable interest in this State. It is that of the *neutrality* of schools between the different religious parties among us."[21]

---

[18] Robert W. Lynn, *Protestant Strategies in Education* (New York: Association Press, 1964), and William B. Kennedy, *The Shaping of Protestant Education: An Interpretation of the Sunday School and the Development of Protestant Educational Strategy in the United States, 1789-1860* (New York: Association Press, 1966).

[19] Neil G. McCluskey, *Public Schools and Moral Education* (New York: Columbia University Press, 1958), p. 49.

[20] *Ibid.*, p. 2.

[21] [illegible] Editor, *Henry Barnard: American Educator* (New York:

I have underlined the word, *neutrality*, because it is a key concept in later discussion and court decisions. Just as nonsectarian striving did not deter Mann from the Protestant Bible, so the search for neutrality did not preclude the use of prayers and Protestant worship for Barnard. Paul Mattingly has shown that the early teachers institutes of Barnard were revival meetings: "Prayers and hymns not only were incorporated into the actual proceedings but usually began and concluded the main exercises and lectures of an institute."[22] In the *American Journal of Education*, which he edited for many years, Barnard published articles that included the answer to the question as to what the public school can do regarding Christianity: "It can, in many instances, with the universal consent of the community, affix a more decidedly religious character to the school duties of each day, by the observance of daily prayers."[23]

Barnard's successor as school commissioner in Rhode Island, E. R. Potter, dealt extensively with the problem of the Bible and prayer in the public schools in his 1853 and 1854 reports. Potter decided cases of objection to prayer on a voluntary basis; there would be no coercion; students who object could be excused; the right of conscience would be upheld. Yet, it was claimed "Religious exercises, if conducted in a really Christian spirit, would seldom be objected to. The Lord's Prayer, or one similar in substance, would probably never be objected to."[24]

By the 1840s, prayer and Bible reading had become the rule but also a bone of contention. As long as communities were predominantly or entirely Protestant, no objection was raised. However, the immigration of Irish and German Catholics, especially to urban centers, challenged Protestant hegemony in education. Meeting in Baltimore in 1840, the Fourth Provincial Council of Roman Catholics requested that parish priests resist Protestant prayers and readings from the Protestant Bible in public schools. Conflict erupted in New York City in the following years, and when prayers and the KJV of the Bible continued in use, Bishop John Hughes urged Catholics to attend parochial schools. Finally, in 1853 there was a ruling by the New York State Superintendent

BEST CO

---

[22] Paul H. Mattingly, *The Classless Profession* (New York: New York University Press, 1975), p. 67.

[23] Henry Barnard, Editor, *Papers for the Teacher* (New York: F. C. Brownell and Hart-

of Schools that prayer could not be mandated as a part of daily classroom activities, and that Catholic pupils could not be required to attend schools where the KJV Bible was used. The controversy between Protestants and Catholics became violent in Philadelphia, and people lost their lives. Homes and churches were burned. The stage had been set for a bitter "Bible war" and a change in policy by boards and courts.

4. *Late Nineteenth Century and Development of Modern Secular Education.* Whereas the "Bible Wars" in New York and Philadelphia pitted Protestants against Catholics, in Cincinnati, Ohio, a coalition was formed of Catholics, Jews, and Protestants to protest religious practices in the public schools. In 1869 the Board of Education voted to eliminate prayers, Bible reading, hymns, and other sectarian religion from classrooms, but the decision split the board and the city. It was appealed to the Superior Court where it was overturned and then to the Supreme Court of Ohio where it was upheld. It is worth noting that the dissenting vote in the Superior Court was cast by Judge Alphonso Taft (father of William Howard Taft, later President of the United States), who argued that in its attitude toward religion "the government is neutral."[25] The Ohio Supreme Court ruled that the Constitution of the State does not enjoin or require religious instruction, or the reading of religious books, in the public schools of the state.[26] Anson Phelps Stokes in his comprehensive work, *Church and State in the United States*, called this "one of the most important decisions in the relation between church and state in this country."[27]

A common practice in the nineteenth century in schools was to allow students to be excused if there was objection to prayer and Bible reading. It was felt that this practice protected the free expression of religion and the sensibilities of minority religious groups. However, in an important decision in 1910 the Illinois Supreme Court declared

> The exclusion of a pupil from this part of the school exercise in which the rest of the school joins, separates him from his fellows, puts him in a class by himself, deprives him of his equality with the other pupils, subjects him to a religious stigma and places him at a disadvantage in

Y AVAILABLE

---

[25] *The Bible in the Public Schools: Arguments in the Case of John D. Minor et al v. Board of Education* (Cincinnati: Robert Clarke & Co., 1870), p. 415.

[26] *Ibid.*, reprinted with appendix, Supreme Court decision of 1872, (New York: Da

> the school, which was never contemplated. All this is because of his religious belief. If the instruction or exercises is such that certain of the pupils must be excused from it because it is hostile to their or their parents' religious beliefs, the said instruction or exercise is sectarian, and forbidden by the Constitution.[28]

The lawsuit was instituted by a group of taxpayers in District 24, who felt as Roman Catholics that they could not allow their children to be taught from a different version of the Bible or be led in a different version of the Lord's Prayer than that approved by the church. Since school attendance was compulsory and there existed no alternative school in the county, their children were virtually coerced into attending a place of worship contrary to their beliefs and conscience. The majority opinion sided with the parents and added that the state and school were civil or secular institutions, not religious, and it was not the duty of the state to teach religion. Practices that were struck down in the Illinois case were the reading of the Bible, recitation of the Lord's Prayer, and the singing of sacred hymns, for all of which students were required to assume a devotional attitude.

In 1903 in Nebraska the court ruled that Bible reading, prayers, and hymns were devotional exercises and, therefore, constituted sectarian instruction. Likewise, in 1890 the Wisconsin Supreme Court had ruled that such religious practices were illegal. The high courts in Louisiana, South Dakota, and Washington also decided against religious exercises. Courts in other states let the practices stand. In an Iowa case in 1884, the court refused to interfere with the custom of teachers to use the first few minutes of each school day to read from the Bible and lead in the Lord's Prayer and religious songs, as long as students were not required to be present during those exercises. The court declared in a 1904 Kansas case that nothing in the state constitution served to exclude the Bible or prohibit a teacher, for the purpose of quieting the pupils and preparing them for their regular lessons, from repeating the Lord's Prayer and the Twenty-Third Psalm, again under the condition that none of the pupils be required to participate. Similar decisions were made in Kentucky, Massachusetts, and Texas. All in all, eight courts declared Bible reading, prayer, and other religious exercises unconstitutional, while 14 courts declared them legal. In many states no action was taken either way.

BEST COPY AVAI

In 1912 Samuel W. Brown wrote a book entitled *The Secularization of American Education*, in which he analyzed legislation, state constitutions, and court decisions in the nineteenth century, which removed church control and sectarian religion from the public schools. According to this author, the aims of education in the seventeenth and eighteenth centuries were largely religious and ecclesiastical, but by the twentieth century they had become civic. Laws were enacted in many states to prohibit sectarian religious instruction and sectarian textbooks in the schools. In many cases this took the form of a constitutional provision. Brown felt that this secularization of public education represented but one phase of the differentiation and separation of the ecclesiastical and the civil powers that had been going on in the country from the earliest years of its history.[29]

This process of secularization reached a peak during the career of William Torrey Harris (1835-1909). Long before he went to St. Louis as a teacher in 1858, the school system had decided not to hold religious exercises in the schools. Contrary to Horace Mann, Harris did not feel that the reading of the Bible without comment had a place in the classroom, and he rejected the idea of non-sectarian religious instruction. For Harris, "the reading of the Bible, the offering of prayers, the teaching of some simple catechism" were all particular forms of Protestantism and were therefore sectarian. It was not that Harris did not have a high regard for religion and the Bible; it was just that he felt that they belonged in the home and church where they could be taught with full respect for truth and integrity.[30] Besides serving as Superintendent of Schools in St. Louis for 12 years, he also was U.S. Commissioner of Education from 1889 to 1906, and in this capacity he did much to influence American schooling through his writing and lecturing.

Samuel Brown had argued that the secularization of the public schools had occurred by the time his study was published in 1912. In his book, *Piety in the Public School*, Robert Michaelsen takes issue with Brown on the basis that church religion was not eliminated from the schools, nor had "secularism" triumphed. Michaelsen admits, however, that it depends upon one's definition of "secular," and that in a formal or legal sense American education did become increasingly secularized in the nineteenth

---

[29] Ibid., see esp. pp. 155f

ABLE

century. Even where the courts did allow Bible reading and other devotional practices, it was because they considered them nonsectarian and a traditional part of a secular program of education.[31] Prayer in the public schools as a policy was turned down by boards of education and courts in different parts of the country, but in other places it continued into the twentieth century.

5. *First Half of the Twentieth Century and State Legislation.* By the beginning of the twentieth century, many religious and educational leaders perceived that religion had been eliminated from the public schools. Ministers preached about the lack of prayer and Bible. Church assemblies, like the Presbyterians in 1890, voted to deplore the absence of the Bible. Many articles were written. Religious and educational associations took action, including the Religious Education Association, which was founded in 1903 explicitly for the purpose of promoting religious and moral education in elementary and secondary schools as well as other institutions. One of the most influential organizations in this period was the National Reform Association with its headquarters in Pittsburgh. In his doctoral dissertation, "The Holy Experiment and Education: The 1913 Public School Bible Reading Legislation in Pennsylvania," Jack Lowe has shown how this relatively small group was instrumental in passing a state law mandating prayer and Bible reading in the schools.[32] With the help of other organizations, this movement spread to other states.

Whereas only one state, Massachusetts, had a statute on the books before 1900, 11 states and the District of Columbia passed laws between 1910 and 1930 that made either morning prayer or Bible reading (or both) mandatory. In addition, six states approved laws that permitted Bible selections, and one state, Mississippi, added a provision to its State Constitution, which provided that the Bible could not be excluded from the public schools. According to Don Conway, who did a comprehensive study of the situation for the University of Chicago in 1956, there were also 19 states where Bible reading was permitted under general terms of silence (no statute) or by interpretation of the Attorney General. Bible reading was not permitted in 11 states by statute or under interpretation of the State Constitution. All the states requiring

BEST COPY AV

---

[31] Robert Michaelsen, *op. cit.*, pp. 109-110.

[32] [illegible]

Bible (and prayer) were in the East and South, except for Idaho. All the states not permitting it were in the West or Mid-West except for New York and Louisiana.[33] These regional differences also showed up in the research of Richard Dierenfield in 1962.[34] With a crazy quilt of local district policies, state laws, contradictory court decisions, and legal opinions, the stage was set for the momentous and historic rulings by the U.S. Supreme Court in 1962 and 1963.

6. *Second Half of the Twentieth Century and U.S. Supreme Court Decisions.* In spite of the diversity of state court rulings, the U.S. Supreme Court consistently refused to accept jurisdiction in cases because of a lack of a substantial federal question. For example, a case was brought to the high court in 1931 from the State of Washington on the grounds that the Bible and religious teaching in public schools were contrary to the First and Fourteenth Amendments to the Constitution, but the justices refused to hear the case. The Supreme Court's decision in the 1940 case, Cantwell *v.* Connecticut, opened the way for future appeals on First Amendment grounds, since it ruled that free exercise of religion was one of the liberties falling within the due process clause of the 14th Amendment. In 1952 a New Jersey law providing for Bible reading in the schools was appealed to the Supreme Court on the basis that it violated the First Amendment clause prohibiting an establishment of religion. The majority of the justices decided that the opinion of the New Jersey court should stand, since no claims of injury were made and the appellant's child had graduated from high school before the case was appealed (Doremus *v.* Board of Education).

In the 1961-62 term the Court agreed to hear the Engle *v.* Vitale case from New York, and in the 1962-63 term they combined two cases, Abington *v.* Schempp from Pennsylvania and Murray *v.* Curlett from Maryland. In the former case the Court ruled "it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government." In the latter two cases the Court decided that Bible reading, even without comment, and prayers, including the Lord's Prayer, were sectarian religious ex-

---

[33] Don Conway, *Summary: State Regulations Concerning Religion and Public Education*, unpublished report printed by the Committee on Religion and Public Education, National Council of Churches of Christ in the U.S.A., Chicago, Illinois, 1955.

ercises and were unconstitutional. A provision for excusing or dismissing students did not mitigate the situation. The justices went out of their way to indicate that the rulings did not mean they were hostile toward religion or that they were rendering the schools "godless." The issue of prayer in public schools had changed considerably through the years from an inherited custom or tradition, often neglected, to a district rule, then to a board policy, sometimes upheld and sometimes overturned by the courts, then a state law, and finally a practice declared unconstitutional by the U.S. Supreme Court.

In summary, this historical review has shown that school prayer is neither as long-standing a custom or as widespread and universal as commonly assumed.

Conclusion

There are at least three implications for religious education. The first is a challenge to churches and other religious institutions not to turn to the public schools for the teaching and practice of religion, but to strengthen and improve their methods and models of education. The second is the recognition that religion has not been excluded from public schools: The courts have encouraged or permitted the academic study of religion; the use of historic documents, addresses, and anthems that express religious faith; the practice of voluntary prayer or even an organized period of silence as long as prayer is not promoted; the use of songs and stories of religious holidays within an educational program; and the existence of extracurricular religious groups in non-instructional periods. The third is an acceptance of the invitation posed by Jack Seymour, Bob O'Gorman, and Chuck Foster to join in "the continuing venture to shape the church's education for this public role and responsibility," namely to reclaim its role in the education of the public.[35]

The Rev. Mr. Kathan is associate pastor of the Cheshire United Church of Christ in Cheshire, CT; archivist of the Religious Education Association, and was Executive Secretary of the Religious Education Association from 1970 to 1981.

---

[35] Jack L. Seymour, Robert T. O'Gorman and Charles R. Foster, *The Church in the Education of the Public* (Nashville: Abingdon Press, 1984), p. 153

BEST COPY AVAILABLE

CURRENT TRENDS FROM THE COURTS

NSBA Council of School Attorneys
Advocacy Seminar

Presented by W. Stuart Stuller
Caplan and Earnest, LLC

I. Mandatory School Uniform Policies - Challenges to mandatory school uniform policies revive issues that were litigated two or more decades ago in challenges to mandatory student dress codes.

  A. Free Speech Challenges - A preliminary inquiry is whether one's choice of dress is an interest protected by the First Amendment's free speech clause. This inquiry is resolved by asking whether there was an intent to convey a particularized message and whether the likelihood was great that the message would be understood by others. Texas v. Johnson, 491 U.S. 397 (1989).

    1. There is a higher likelihood that First Amendment values will be implicated when the regulation on clothing is content specific, i.e., targets specific clothing, especially T-shirts or clothing accessories. Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503 (1969) (wearing black arm bands to protest the war in Vietnam constitutes pure political speech); Castorina v. Madison County Sch. Bd., 246 F.3d 536 (6th Cir. 2001) (dress code banning clothing with illegal, immoral or racist implications implicates First Amendment); Boroff v. Van Wert City Bd. Of Educ., 220 F.3d 465 (6th Cir. 2000) (prohibition against Marilyn Manson T-shirts implicates First Amendment); Stephenson v. Davenport Comm. Sch. Dist., 110 F.3d 1303 (8th Cir. 1997) (prohibition against gang-related clothing implicates First Amendment); Phillips v. Anderson County Sch. Dist. Five, 987 F. Supp. 488 (D. S.C. 1997) (prohibition against clothing displaying confederate flag implicates First Amendment); Chalifoux v. New Caney Indep. Sch. Dist., 976 F. Supp. 659 (S.D. Tex. 1997) (prohibition against gang-related clothing implicates First Amendment); Pyle v. South Hadley Sch. Comm., 861 F. Supp. 157 (D. Mass. 1994) (prohibition against clothing that

harasses or intimidates on the basis of race implicates First Amendment).

a. In these instances, courts likely will apply Tinker's material and substantial disruption standard requiring the school to put forward facts from which school officials could conclude that there is a reasonable likelihood of a material and substantial disruption. E.g. Castorina, 246 F.3d at 544 (remanding for trial). If, however, the prohibition targets lewd or vulgar speech, there is a strong likelihood that a court will uphold the prohibition under Bethel School District v. Fraser, 478 U.S. 675 (1986).

2. Regulations relating to the way a garment is constructed or worn are less likely to raise First Amendment concerns. Bivens v. Albuquerque Publ. Sch., 899 F. Supp. 556 (D.N.M. 1995) (sagging pants nothing more than an adolescent fashion trend not particularized speech).

B. The constitutional virtue of school uniform policies is that they do not target specific messages for prohibition. Littlefield v. Forney Indep. Sch. Dist., 108 F. Supp. 2d 681 (N.D. Tex. 2000) (refusing to apply free speech scrutiny to school dress code); Phoenix Elem. Sch. Dist. No. 1 v. Green, 943 P.2d 836 (Ariz. App. 1997) (terming dress code a content-neutral regulation of student dress).

C. Even where courts recognize a free speech interest in wearing clothing of one's choice, courts have recognized content-neutral uniform policies to be an effort to improve school environments, rather than regulations that intentionally target speech. Canady, 240 F.3d at 443. These courts have relied on the test from United States v. O'Brien, 391 U.S. 367 (1968) for assessing the constitutionality of a statute or regulation that while not targeted at speech incidentally reaches expressive conduct:

> "A School Board's uniform policy will pass constitutional scrutiny if it furthers an important or substantial government interest; if the interest is unrelated to the suppression of student expression; and if

the incidental restrictions on First Amendment activities are no more than is necessary to facilitate that interest."

Canady, 240 F.3d at 443; see also Long v. Bd. of Educ., 121 F. Supp. 2d 621, 625 (W.D. Ken. 2000).

1. The school district's interests – improving the school environment, eliminating tensions related to clothing, identifying intruders – are important. Canady, 240 F.3d at 443, Boroff, 220 F.3d at 471; Long 121 F. Supp. at 626.

2. These interests are also considered to be unrelated to the suppression of speech. Canady, 240 F.3d at 443, Long 121 F. Supp. at 626.

3. Finally, given that students may wear what they wish outside the school environment and express their opinions within the school environment, the uniform policies cover only as much speech as is necessary to promote the school district's interest.

D. Liberty Interest Challenges - A second line of attack to school uniform policies may involve the assertion that students have a liberty interest in their personal appearance that is protected by the Due Process Clause, an issue addressed by the Supreme Court in the context of a challenge to a hair length regulation. Kelley v. Johnson, 425 U.S. 238 (1976). Nonetheless, given that such a liberty interest would not be deemed to be fundamental, requiring only rational basis review, such a challenge almost inevitably would fail.

E. Not surprisingly then, challenges to mandatory school uniform policies have been uniformly rejected, albeit on differing grounds. Canady, supra (policy satisfies O'Brien); Long, supra (policy satisfies O'Brien), Littlefield, supra (no speech interest implicated); Green, supra (applying forum analysis). Instead, the more difficult issue relates to opt out provisions.

F. School Uniforms and Opt-Out Provisions

1. Challenges to Policies That Contain Opt-out Provisions - A federal court has upheld a mandatory uniform policy that contains an opt-out provision for "bona fide religious or philosophical objections" requiring parents seeking to invoke the opt out provision to disclose

information necessary for school to determine if the policy is applicable. Littlefield v. Forney Indep. Sch. Dist., 108 F. Supp. 2d 681 (N.D. Tex. 2000).

a. Difficult issues may arise regarding the implementation of opt-out policies; i.e. would requiring the applicant to comply with the policy constitute a substantial burden on the applicant's religious beliefs; are the religious beliefs sincerely held, is the school making legitimate distinctions between objectors.

2. Challenges to Policies That Do Not Contain Opt-Out Provisions - In contrast, a federal court has recognized that a policy that does not have an opt-out provision may be subject to challenge. Hicks v. Halifax County Board of Educ., 93 F. Supp. 2d 649 (E.D.N.C. 1999).

a. The scope of Free Exercise challenges were substantially limited, or at least called into question, by the Supreme Court in Employment Division v. Smith, 494 U.S. 872 (1990). Prior to Smith, courts would apply the strict scrutiny test of Sherbert v. Verner, 374 U.S. 398 (1963), when a regulation caused a substantial burden on Free Exercise rights. After Smith public entities are not required to exempt persons from neutral and generally applicable regulations even if the application of those regulations does impose a burden on the exercise of one's religion.

b. Hybrid Rights - The Court, however, indicated that strict scrutiny still might be available when a Free Exercise claim is combined with another constitutional claim, pointing to Wisconsin v. Yoder, 406 U.S. 205 (1972), as an example of a case where strict scrutiny was applied because a Free Exercise claim had been combined with a parental rights claim. Smith, 494 U.S. at 881.

i. The willingness of courts to apply strict scrutiny to such "hybrid rights" claims varies from circuit to circuit. Miller v. Reed, 176 F.3d 1202, 1208 (9th Cir. 1999) (no hybrid rights claim absent a colorable parental rights claim); Swanson v. Guthrie Indep. Sch.

Dist., 135 F.3d 694, 700 (10th Cir. 1998) (no hybrid rights claim absent a colorable parental rights claim); Brown v. Hot, Sexy, and Safer Prod., Inc., 68 F.3d 525 (1st Cir. 1995) (no hybrid rights claim absent a colorable parental rights claim), compare Kissenger v. Board of Trustees, 5 F.3d 177 (6th Cir. 1993) (refusing to recognize hybrid rights claim).

II. Regulation of Private Student Use of the Internet

A. School regulation of student use of school computers raises a distinct set of issues from the circumstance where a student creates a private web site that relates to schools or school personnel.

1. While Tinker's material and substantial disruption standard generally applies to student speech that happens to occur on school grounds, an initial question raised by these cases concerns whether Tinker applies to student web sites that are created off campus but which are accessible on-campus. Outside the school context, the government generally must satisfy higher constitutional standards for imposing content based restrictions ad or sanctions on speech. Brandenburg v. Ohio, 395 U.S. 444 (1969) (clear and present danger) or the fighting words standard of New Hampshire v. Chaplinsky, 315 U.S. 568 (1942) (fighting words), the obscenity standard of Miller v. California, 413 U.S. 15 (obscenity).

2. This issue of whether Tinker applies to speech that originates off-campus has arisen most frequently in the context of underground newspapers that are produced off campus, courts are more willing to apply Tinker where there is a geographic nexus to the school environment.

a. The Seventh Circuit applied Tinker and found that there was a reasonable likelihood of a material and substantial disruption of the school environment where a student wrote an article describing how to hack into a school's computer system and the parties stipulated that the article was distributed on campus. Boucher v. Sch. Bd. of the Sch. Dist. of Greenfield, 134 F.3d 821 (7th Cir. 1998).

b. In a second case, a court applied Tinker to a student internet speech that happened to make its way to the school environment, stating: "The overwhelming weight of authority has analyzed student speech (whether on or off school campus) in accordance with Tinker." Killion v. Franklin Regional Sch. Dist., 136 F. Supp. 2d 446, 455 (W.D. Pa. 2001). The court, however, refused to apply Bethel's lewd and vulgar standard because the speech originated off-campus. Id. at 456-57; Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175 (E.D. Mo. 1998) (applying Tinker to student web site created off campus, but accessed by students at school); compare Klein v. Smith, 635 F. Supp. 1440 (D. Me. 1986) (Tinker not applied where student gave teacher "the finger" in restaurant parking lot).

c. At least one court has implied that the dispositive inquiry is not where the speech occurred but what effect it had on the school environment: "[C]ourts have allowed school officials to discipline students for conduct occurring off of school premises where it is established that the conduct materially and substantially interferes with the educational process." J.S. v. Bethlehem Area Sch. Dist., 757 A.2d 412, 421(Pa. Comwlth. 2000).

d. Thus, while courts may apply the Tinker standard to off-campus speech concerning the school, court are generally less inclined to find that off-campus speech is likely to lead to a material and substantial disruption where it occurs off school grounds. Killion, 136 F. Supp. 2d at 456 ("We cannot accept, without more, that the childish and boorish antics of a minor [web site referring to librarian as "book Nazi" and insulting the athletic director's genitals] could impair the administrator's abilities to discipline students and maintain control."); Beussink, supra, (vacating suspension of student for web site that was critical of the school in crude and vulgar terms because principal did not investigate whether there had been a disruption prior to suspending the student); but see J.S. v. Bethlehem Area Sch. Dist., 757 A.2d 412 (Pa. Commw. Ct. 2000) (student web site that referred to teacher in extremely vulgar terms and accused the principal of infidelity disrupted the school environment because the site had a negative effect on other student's perceptions of the faculty members).

2. A related issues arises when a student posts writings on the internet with dark or violent themes. There is a constitutional distinction between a true threat and idle talk, jest, or dramatic license. Lovell v. Poway Unified Sch. Dist., 90 F.3d 367, 371-72 (9th Cir. 1996); see generally Watts v. United States, 394 U.S. 705, 705-06 (1969) ("If they ever make me carry a rifle the first man I want to get in my sights is L.B.J" not a threat); Rankin v. McPherson, 483 U.S. 378 (1987) - ("If they go after [President Reagan] again, I hope they get him" protected by First Amendment).

   While the specific formulation may vary from circuit to circuit, generally the applicable inquiry is "whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault." Id. at 372. True threats are clearly a basis for discipline. Lovell, 90 F.3d 367 (Frustrated student's statement "If you don't give me the schedule change, I'm going to shoot you" constitutes true threat.); State of Wisconsin v. A.S., 2001 WL 515268 (Wis. 2001) - (student's statement that he was going to kill everyone at the middle school with lengthy description, graphic details, and which was spoken with intent to alarm classmate did constitutes true threat); H.J. v. State of Indiana, 746 N.E.2d 400 (Ind. App. 2001) ("We're gonna put a gun to your head . . . pull the trigger and it'll only hurt for 30 seconds" constitute threat).

    1. Courts have been unwilling to impose federal constitutional liability upon schools for failing to protect students even when school officials are aware of threats to students. Morse v. Lower Merion Sch. Dist., 132 F.3d 902 (3rd Cir 1997) (dismissing complaint alleging that teacher was killed by mentally deranged woman who gained access to school after warnings of previous security breaches); Stevens v. Umsted, 131 F.3d 697 (7th Cir. 1997) (dismissing complaint alleging that student was sexually assaulted by other students after school principal had actual knowledge of prior assaults); Leffall v. Dallas Indep. Sch. Dist., 28 F.3d 521 (5th Cir. 1994) (dismissing complaint alleging that student was killed attending school function at which authorities knew gunfire frequently occurred); Graham v. Indep. Sch. Dist. No. I-89, 22 F.3d 991 (10th Cir. 1994) (dismissing substantive due process claim based

on allegations that school officials knew that a student had threatened a classmate, was armed, but failed to intervene); Johnson v. Dallas Indep. Sch. Dist., 38 F.3d 198 (5th Cir. 1994) (dismissing complaint alleging that school's security lapses allowed student's murder); Dorothy J. v. Little Rock Sch. Dist., 7 F.3d 729 (8th Cir. 1993) (dismissing a complaint alleging that mentally retarded student was assaulted by student whom school administrators knew had a history of violent behavior).

2. Courts' willingness to impose liability upon schools for failing to protect students depends upon state common law and immunity law. Compare Brum v. Town of Dartmouth, 704 N.E. 2d 1147 (1999) (school officials immune from liability for student's stabbing death); Leger v. Stockton Unified Sch. Dist., 202 Cal. App. 3d. 1448 (3rd Dist. 1988) (complaint alleging that student was injured in restroom by nonstudent intruder where officials knew or should have known the restroom was unsafe states cause of action).

C. An more complex issue arises when the student's work does not constitute a true threat but still embodies themes of death or violence. In one case, a high school student constructed a web site characterized as the "unofficial" homepage of his high school with mock obituaries of classmates, asking readers to vote on who should die (i.e., be eulogized) next. Emmett v. Kent Sch. Dist. No. 415, 92 F. Supp.2d 1088 (W.D. Wash. 1998). The court, applying Tinker, did not find a basis for disciplining the student, at least in part because no students perceived the site to be a serious statement of intent to kill classmates.

1. Exploratory/Emergency Suspensions - In a more recent case, the Ninth Circuit upheld an emergency, not punitive, suspension of a student who turned in a poem with a first person description of a classroom shooting. LaVine v. Blaine Sch. Dist., 257 F.3d 981 (9th Cir. 2001). The suspension, however, was not based so much on the poem but on information gathered as a result of the poem, i.e., that the student had expressed suicidal ideations, had received a court order prohibiting his father from having contact with him, had recently broken up with his girlfriend, and had been involved in prior school discipline incidents including a fight.

In a second case, a federal district court held that removing a student who, without authorization posted in the hallway a poster intended to look maniacal, and that stated in part, "I'll kill you if you don't tell me who killed my dog. . . I'll kill you all" could be removed for a short term investigative period, but the student could not be required to undergo a psychiatric testing. Boman v. Bluestem Unified Sch. Dist. No. 205, Case No. 00-1034-WEB, 2000 WL 297167 (D. Kan. Jan. 28, 2000).

Finally, while the Wisconsin Supreme Court held that a frustrated eighth grade student's creative writing story in which a student kills a teacher obviously modeled after his teacher classroom teacher was not a threat because it was written in the third person, contained obvious hyperbole, and was submitted as a creative writing assignment. State of Wisconsin v. Douglas D., 608 N.W.2d 438 (Wis. 2001). Nonetheless, the court expressed approval of the school's suspension of the student because the story was obviously intended to insult the teacher.

D. More difficult issues may well arise as students who frequently mimic what they see and hear in pop culture which is often perverse and violent. See generally Eminem, "Kill You," The Marshall Mathers LP, (2000) (rap song with violent and profane lyrics).

While school officials are always free to initiate conversations with students or direct them to see a school counselor, if they believe that a student is struggling emotionally, the task of actually and accurately predicting future violence is very complex:

> The issue facing educators, law enforcement agencies and the wider public is not how to predict school violence. Reliably predicting any type of violence is extremely difficult. Predicting that an individual who has never acted out violently in the past will do so in the future is still more difficult. Seeking to predict acts that occur as rarely as school shootings is almost impossible. This is simple statistical logic: when the incidence of any form of violence is very low and a very large number of people have identifiable risk factors, there is no reliable way to pick out from that large

group the very few people who will actually commit the violent act.

After a violent incident has taken place, retracing an offender's past and identifying clues that in retrospect could have been signs of danger can yield significant, useful information. However, even clues that appear to help interpret past events should not be taken as predictors of similar events in the future. At this time, there is no research that has identified traits and characteristics that can reliably distinguish school shooters from other students. Many students appear to have traits and characteristics similar to those observed in students who were involved in school shootings.

FBI Critical Incident Response Group, The School Shooter: A Threat Assessment Perspective, National Center for the Analysis of Violent Crime.

STUDENT FIRST AMENDMENT RIGHTS IN ELEMENTARY SCHOOLS -

IS MORE DEFERENCE AFFORDED TO SCHOOL AUTHORITIES?

Stephen S. Russell, Esquire
STOCK AND LEADER, P.C.
35 S. Duke Street
York, PA 17405-5167
(Chair, School and Municipal
Practice Group)

When addressing free speech issues in the public school setting, there are two conflicting educational concepts that must be reconciled. The first is the traditional view that schools stand *in loco parentis* over their students. This is because students are a captive audience who are required to attend the school, and therefore, the school is required to protect the students. Balanced against this are the student's rights to freedom of expression.

The Supreme Court has recognized that students are not yet "possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." *Tinker v. Des Moines Indep. Com. School Dist.*, 393 U.S. 503, 515, 89 S.Ct. 733, 21 L.Ed. 731 (1969) (Stewart, J. concurring). This was further recognized by the Seventh Circuit in *Zykan v. Warsaw Com. School Corp.*, 631 F.2d 1300 (7th Cir. 1980), where that court stated "[a] high school student's lack of the intellectual skills necessary for taking full advantage of the marketplace of ideas engenders a correspondingly greater need for direction and guidance from those better equipped by experience and reflection to make critical educational choices." *Id.* at 1304.

Although students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gates," *Tinker*, 393, U.S. at 512, 89 S.Ct. 733, the Constitution does not require "teachers, parents and elected school officials to surrender control of the American public school system to public school students." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 686, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986) (quoting *Tinker*, 393 U.S. at 526, 895 S.Ct. 733 (Black, J., dissenting)).

A short review of Supreme Court decisions regarding students' rights to free speech in the school setting is instructive. The Supreme Court in *Tinker* for the first time established the test to be used in balancing the individual students' rights with the rights of the school in the area of free speech. The Court held that "[a student] may express his opinions . . . if he does so without materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others." *Tinker* at 513, 89 S.Ct. at 740 (internal citations omitted). In that case, the Supreme Court held that students were allowed to wear black armbands in protest of the Vietnam War.

This test was further refined in *Bethel*, 478 U.S. 675, 106 S.Ct. 3159. In that case, the Court upheld the right of a school to discipline a student for presenting a sexually charged nominating speech during a school assembly. The Court recognized the student's freedom to "advocate unpopular and controversial views" but said that it "must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior." *Id.* at 681, 106 S.Ct. at 3163. The Court further held that "the constitutional rights of students in public schools are not automatically coextensive with the rights of adults in other settings." *Id.* at 682, 106 S.Ct. at 3164. The Court emphasized that the age of the audience was an important factor in its decision and stressed the vulnerability of a "less mature audience" to the offensive speech. *Id.* at 683-85, 106 S.Ct. at 3164-65. The Court recognized "the obvious concern on the part of parents, and school authorities acting *in loco parentis*, to protect children – especially in a captive audience – from exposure to sexually explicit, indecent, or lewd speech." *Id.* at 684, 106 S.Ct. at 3165.

The Court reinforced this standard in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed. 592 (1988). In that case, the Court upheld the right of a principal to remove an inappropriate article from the student newspaper prior to publication. The Court again recognized that competing interests of the school versus the student speech rights but emphasized that “[a] school need not tolerate student speech that is inconsistent with its basic educational mission.” *Id.* at 260, 108 S.Ct. at 564 (internal citations omitted).

The first issue when analyzing any claim for free speech is the type of forum in which that speech is to take place. The Supreme Court recognized in *Hazelwood, supra*, that “school facilities may be deemed to be public forums only if school authorities have ‘by policy or by practice’ opened those facilities ‘for indiscriminate use by the general public,’ or by some segment of the public, such as student organizations.” *Id.* at 267, 108 S.Ct. 568 (citing *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 n. 7 & 47, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983)). “‘The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.’” *Id.* at 267, 108 S.Ct. 568 (quoting *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788, 802, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985)).

In a non-public forum, speech is subject to significantly greater control and limitation than in a public forum. A school, therefore, can exercise more control and place more limitations on speech than would be allowed with regard to the general public on a public street. The test applied in a school setting is whether the restrictions are “reasonably related to legitimate pedagogical concerns.” *Hazelwood*, 484 U.S. at 273, 108 S.Ct. at 571.

While the Supreme Court has addressed the issue of free speech in the context of a high school, it has never directly addressed the issue when applied to an elementary school. A search of case law has turned up no cases applying the *Tinker* standard to the elementary school setting. Rather, age appears to be a critical factor in the outcome of school-based claims for freedom of speech.

The Seventh Circuit addressed this issue in *Muller v. Jefferson Lighthouse School*, 98 F.3d 1530 (7th Cir. 1996), *cert. denied*, 520 U.S. 1156, 117 S.Ct. 1335, 137 L.Ed.2d 495 (1997). There the Court stated that:

> it follows that a public elementary school can shield its five through thirteen-year olds from topics and viewpoints that could harm their emotional, moral, social, and intellectual development. The 'marketplace of ideas,' an important theme in the high school student expression cases, is a less than appropriate description of an elementary school, where children are just beginning to acquire the means of expression.

Id. at 1538. The Court recognized that "[p]rior restraint in the public school context, and especially where elementary schools are concerned, can be an important tool in preserving a proper educational environment." *Id.* Specifically, the Court pointed to the need for the school to screen out materials that promote hate and/or violence. The Court astutely noted that "[w]here public school children are involved there is no practical way to protect students from materials that can disrupt the educational environment or even severely traumatize a child without some form of prior restraint . . . . Obviously, the school officials cannot know beforehand the nature of all literature students, or those acting through them, seek to distribute; and post-hoc responses to harmful distribution cannot always undo the damage." *Id.* at 1541.

A similar decision was recently reached by the Eighth Circuit in *Henerey v. City of St. Charles*, 200 F.3d 1128 (9th Cir. 1999). There, a student was disqualified from running for the student government after he passed out condoms to several students along with his campaign stickers in violation of a school rule requiring prior approval for distribution of materials. The Court upheld the constitutionally of the school rule finding that it was "one expression of the 'legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral or political.'" *Id.* at 1135 (quoting *Bystom v. Fridley High Sch. Indep. Sch. Dist.*, No. 14, 822, F.2d 747, 750 (8th Cir. 1987) (quoting *Board of Educ. Island Trees Union Free Sch. Dist. No. 26 v. Pico.*, 457 U.S. 853, 864, 102 S.Ct. 2799, 73 L.Ed.2d 435 (1982)).

In Pennsylvania, the State Board of Education recognized the need for school districts to protect students from inappropriate and/or damaging materials distributed through the schools. First, the Pennsylvania Code provides unequivocally that "[s]tudents may use publications, handbills, announcements, assemblies, group meetings, buttons, armbands and any other means of common communication, *provided that the use of public school communications facilities shall be in accordance with the regulations of the authority in charge of those facilities.*" 22 Pa. Code ▯ 12.9(c). The regulation then goes on to provide that "[s]chool officials may require students to submit for prior approval a copy of materials to be displayed, posted or distributed on school property." In addition, the regulation states that "[s]chool officials may set forth the time and place of distribution of materials so that distribution would not materially or substantially interfere with the requirements of appropriate discipline in the operation of the school." It then reiterates that "[a]pproval procedures must be followed prior to distribution or display of materials on school property."[1]

In *Denooyer v. Merinelli*, 12 F.34 211, 1993 WL 477030 (6th Cir. 1993 (Mich.)), *cert. denied, Denooyer v. Livonia Public Schools,* 511 U.S. 1031, 114 S.Ct. 1540 (1994) the Court would not apply the *Tinker* standard to decide whether the school violated a second grade student's rights by not allowing her to show her class a videotape of herself singing a religious proselytizing song in a church service. Rather, the court applied *Hazelwood* because, as the tape was to be played in the classroom, it was a closed forum in which the school could regulate both the style and content of the representation. The Court did not discuss the issue of whether there should be any distinctive treatment of elementary school students.

In *Slotterback v. Interboro School District,* 766 F. Supp. 280 (E.D. Pa. 1991), a case challenging the denial of a high school student's request to distribute religious tracts at school without restriction, the Court discussed the test for review. In doing so it did address the elementary school issue. It noted that:

> "It is possible that the impressionability of students at the school district's elementary schools provides a compelling establishment clause interest for . . . [the] content-based ban on religious materials at those schools." However, the court further noted that "even at the elementary school level . . . the school district's current content-based ban is substantially over broad. Specifically, establishment clause concerns would not justify prohibiting all non-

---

[1] These regulations were adopted by the State Board of Education whose authority to do so was affirmed by the Supreme Court of Pennsylvania in *Girard School District v. Pitterge*, 481 Pa. 91, 392 A.2d 261 (1978). The regulations did not distinguish between elementary and secondary schools. The regulations were adopted in 1973.

> school written religious material at any of the schools in the district." *Id.* at 296.

The Court thought that a religious leaflet handwritten and distributed by a fifth grader at school would present no establishment clause concerns.

Johnston-Loehner v. O'Brien, 859 F. Supp. 575, 94 Ed. Law Rep. 167 (D.C. M.D. Fla. 1994) struck down a school policy requiring prior approval by the superintendent before distribution of non-school materials. The student was in elementary school and she wanted to distribute written materials directly to other students during non-class time -- mainly a religious pamphlet and a flyer inviting students to attend a church party as an alternative to Halloween trick-or-treating.

The policy covered all grades and there were no written guidelines limiting the approving official's authority. The Court was concerned about the overbreadth of the policy. School officials noted that they did not apply the policy as broadly as it was written. The Court was quick to point out that ". . . the First Amendment right of free speech is equally offended by the threat of abridgement as by the act of abridgement." *Id.* at 580 (citation omitted).

Defendants raised an Establishment clause argument that the Court struck down because they failed to show that the religious speech they wanted to prevent would materially and substantially interfere with school operations or with the rights of others.

Baxter v. Vigo County School Corporation, 26 F.3d 728, 92 Ed. Law Rep. 36 (7th Cir. 1994) involved an elementary student's claim that her principal and the school violated her rights to freedom of speech, due process and equal protection by prohibiting her from wearing T-shirts that read "Unfair Grades," "Racism" and "I hate Lost Creek."

Citing *Bethel* and *Hazelwood* the Court noted that since *Tinker* was decided the United States Supreme Court cast some doubt on the extent of the student free speech rights in the school context. The court pointed out that *Bethel* did allude to the issue of age (478 U.S. at 682):

> ". . . it does not follow . . . that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in public school." (Not distinguishing elementary versus secondary).

The court was reviewing the issue as to whether Azar (the principal) was entitled to qualified immunity which, of course, includes the question of whether the matter allegedly violated was a "clearly established" right. It held that

> ". . .Chelsie was in elementary school when her attempts at self-expression were blocked. She was at least several years younger than the youngest student in *Tinker*. This does not mean that elementary students are entitled to no First Amendment protection. *cf Hedges v. Wauconda Comm. Sch. Dist. No. 18*, 9 F.3d 1295, 1298 (7th Cir. 1993) (stating that "nothing in the first amendment postpones the right of religious speech until high school"). But given the indications in *Fraser* and *Kuhlmeier* that age is a relevant factor in assessing the extent of a student's free speech rights in school, in addition to the dearth of case law in the lower federal courts, we are unable to conclude that the Baxters have demonstrated that the right Azar is alleged to have violated was 'clearly established'."

Azar, therefore, was entitled to qualified immunity on the First Amendment claim.

In *Schanou v. Lancaster County School District No. 160,* F.3d 1040 (8th Cir. 1995) the Court faced the issue of whether the Gideons could distribute bibles once a year to the fifth grade students after school on a sidewalk just outside of the elementary school building. The Court did not decide the issue of the constitutionality of the policy because the student had graduated by the time the case was heard and the parents lacked standing to sue.

"How low can you go" is a phrase in the age-old tune Limbo-Rock. Apparently, in public school litigation we can go to at least first grade when it comes to First Amendment issues. In *Harless v. Darr*, 937 F. Supp. 1339 (S.D. Ind. 1996), the student was a first-grader who was distributing religious tracts to other first-grade students in class, while they were preparing to go to the lunchroom. The teacher stopped him from distributing the tracts and asked the other students to give them back. He later did the same thing on the bus and was told not to do so. Sometime after this the district did adopt a policy on distribution of literature and the student later distributed his religious tracts in compliance with the policy. The Plaintiff's challenged the policy and the prior actions of the teachers. Distribution of religious literature was treated the same as any other material. After further briefing the court concluded that unconstitutional prior restraint -- which was required by the policy -- was not present in this case. Prior restraint includes application for use, the power of government authority to determine whether approval to speak/distribute depends on the government's affirmative action and approval is not a matter of routine.

Upon review, the court felt that the policy did not empower the superintendent with discretion to forbid distribution based on content. In addition, a student did not have to wait for affirmative action before proceeding with distribution. Because of these factors the policy did not constitute an impermissible prior restraint.

A school board in West Virginia had allowed non-student private groups, such as Little League and the various Scout groups and the WCTU to distribute literature in the schools. Groups wishing to distribute religious or political materials were denied the same access. Later, upon request and in response to objections, the board allowed passive distribution of religious and political materials. The board allowed materials to be set up on tables one day a year and they were manned by private citizens and the tables bore a disclaimer that the district did not sponsor or endorse the materials. The policy was challenged and was ultimately upheld by the Fourth Circuit. *Peck v. Upshun County Board of Education*, 155 F.3d 274 (4th Cir. 1998).

The court, however, did find the policy unconstitutional to the extent that it allowed the display of the Bible and other religious materials in elementary schools. The court responded as follows:

> "While we are not convinced that, even in the elementary school context, concerns of coercion or endorsement of coercion should be sufficient to constitutionally foreclose the County from implementing a neutral policy designed to accommodate free speech and free exercise interests...we are convinced that a majority of the Supreme Court might well believe that these concerns should be and are sufficient in the elementary school context to invalidate such a policy. We can appreciate fully what might be the Court's thinking in this regard. In elementary schools, the concerns animating the coercion principle are at their strongest because of the impressionabiiity of young elementary-age children. Moreover, because children of these ages may be unable to fully recognize and appreciate the difference between government and private speech -- a difference that lies at the heart of the neutrality principle -- the County's policy

> could more easily become perceived as endorsement rather than as neutrality . . . ."

(*Id.* at 288, Fn.)

In a convoluted order, the Third Circuit Court of Appeals affirmed, by an equally divided vote, entry of judgement for school district dependants on a First Amendment claim where the student was allegedly denied the right to read a religious story to her classmates. The "majority" found that Plaintiff failed to show the involvement of any of the defendants in an incident where her poster of Jesus was allegedly moved from the school hallway in an elementary school. She was given leave to amend her complaint. *C.H. v. Olivia,* 226 F.3d 198 (3rd Cir. 2000), *cert. denied Hood v. Medford Township Bd. of Educ.*, 121 S.Ct. 2519, 150 L.Ed.2d 692 (2001).

The United States Supreme Court had occasion recently to indirectly address the elementary school speech issue in *Good News Club v. Milford Central School,* 530 U.S. 640, (2001), 121 S.Ct. 2093, 150 L.Ed.2d 151 (2001). There the Court held that the School District violated the Free Speech Clause when it denied the Good News Club access to the limited public forum because of its religious viewpoint. The Club had sought use of school facilities after school for the purpose of having a "fun time" of singing songs, hearing a Bible lesson and memorizing scripture."

Milford argued that the policy involved elementary children and that they would perceive school endorsement of the Club and pressure to participate because the activity takes place on school grounds (even though after school). The Court did not buy the arguments for several reasons, including several relating to elementary students.

There were several matters addressed by the court as they relate to elementary students:

> 1. As to whether there would be coercive pressure to attend, the relevant community was the parents, not the elementary students because children could not attend the meetings without parental permission.
> 2. The Establishment Clause has not been used to foreclose private religious conduct occurring during non-school hours because it may occur on school property where elementary school children may be present.
> 3. *Edwards v. Aguilland,* 482 U.S. 578 (1987) is inapplicable where non-school teachers are giving lessons after school to children permitted to attend only with parental permission.
> 4. The court believed the following facts would not lead to a belief that small children would perceive endorsement:
>   a. They were not permitted to loiter outside the classrooms after the school day ended.
>   b. Young children are aware of events for which their parents sign permission forms.
>   c. Meetings were held in a combined high school resource room and middle school special education room, not an elementary classroom.
>   d. The instructors were not school teachers.
>   e. Children were not the same age as in a normal classroom (they ranged in age from 6 to 12).

(NOTE: students from K-12 all attended school in the same building.) Finally, the court was more concerned that children would perceive a hostility toward the religious viewpoint of the Club than that that they would misperceive the endorsement of religion.

As one can tell, the cases seem to go all over the landscape. They do, however, seem to suggest, generally, that school officials can exercise more control over student speech in the elementary setting.

Recently the Third Circuit Court of Appeals summarized the most significant U.S. Supreme Court cases dealing with student speech. It was stated that "under *Fraser,* a school may categorically prohibit lewd, vulgar, or profane speech." Under *Hazelwood,* a school-sponsored speech . . . on the basis of legitimate pedagogical concern. Speech falling outside of these categories is subject to *Tinker's* general will, "it may be regulated only if it would substantially disrupt school operations or interfere with the rights of others." *Saxe v. State College Area School District,* 2001 WL 123852 (3rd Cir. Feb. 14, 2001).

If *Tinker* is applicable and the elementary school is not a public forum (which one assumes most are not), the test is one of "reasonableness" as established in *Hazelwood,* i.e., whether the restrictions are "reasonably related to legitimate pedagogical concerns." *Hazelwood,* 484 U.S. at 273, 108 L.Ed at 571. Allowing an administrator to review and approve all material prior to distribution is arguably "reasonably related to legitimate pedagogical concerns." As has been noted, it is well within the province of an elementary school to protect its young students from inappropriate and unprotected speech. The only way to make sure that the students are not subjected to inappropriate materials is to require that any materials to be given to the students are reviewed prior to distribution. As *Muller* noted, school officials could not "know beforehand the nature of all literature students, or those acting through them, seek to distribute; and post-hoc responses to harmful distribution cannot always undo the damage." *Muller* 98 F.3d at 154.

DRESS CODES

This topic will be covered elsewhere in the materials and presentations. It should be noted, however, that there are some cases addressing dress codes/uniforms in elementary schools. *Greco v. Mt. Carmel School District* (No. CV-00-1900, M.D. Pa. Jan. 2, 2001), held that a student dress code policy did not violate the First Amendment rights of K-6 students. *Canady v. Bossier Parish School Board*, 240 F.3d 437 (5th Cir. 2001) applied to all public schools within the district. The Court held that a mandatory uniform policy did not violate the students' First Amendment rights. *Hicks v. Halifax County Board of Education*, 1999 WL 1940002 (E.D. N.C. 1999), was a lawsuit filed by an eight-year old, third grade student challenging a mandatory school uniform policy. The federal district court denied plaintiff's motion for a preliminary injunction. In *Jeglin v. San Jacinto Unified School District*, 827 F. Supp. 1459 (C.D. Cal. 1993), the Court enjoined application of a dress code to elementary and middle school students which prohibited clothing identifying any professional sports team or college.

BOY SCOUTS

Boy Scouts of America v. Dale, 530 U.S. 640, 120 S.Ct. 2446, 147 L.Ed.2d 554 (2000) involved the question of whether the Boy Scouts could exclude a person as an adult member based on his sexual orientation. Dale was an assistant scoutmaster whose position was revoked because he was a homosexual and a gay rights activist. He sued alleging that the Boy Scouts violated New Jersey's public accommodations statute. The New Jersey Superior Court held that the Boy Scouts violated the statute which prohibits discrimination on the basis of sexual orientation in places of public accommodation. The New Jersey Supreme Court affirmed, finding that the Boy Scouts violated the public accommodations statute by revoking Dale's membership based on his avowed homosexuality.

On appeal, the United States Supreme Court reversed and held that the First Amendment prohibited the State from requiring the Boy Scouts to permit Dale's membership via its public accommodations law. While one can pontificate on the Court's holdings and its discussions, the following points are representative of its opinion, for purposes of this discussion.

> "First, associations do not have to associate for the 'purpose' of disseminating a certain message in order to be entitled to the protections of the First Amendment. An association must merely engage in expressive activity that could be impaired in order to be entitled to protection."

530 U.S. at 655.

> "Second, . . . the First Amendment protects the Boy Scouts' method of expression (even if views on sexual issues are discouraged from discussion)."

Id.

> "Third, the First Amendment simply does not require that every member of a group agree on every issue in order for the group's policy to be 'expressive association' . . . . The Boy Scouts has a First Amendment right to choose to send one message but not the other. The fact that the organization does not trumpet its views from the house tops, or that it tolerates dissent within its ranks, does not mean that its views receive no First Amendment protection."

Id. at 655-656. It was ultimately found that the Boy Scouts is an expressive association and that forced inclusion of Dale would significantly affect its expression.

Of course, the hue and cry of "what do we do!" arose immediately after the decision. Schools were concerned about whether they can or must allow a "discriminatory organization" to use its facilities and whether the school would be discriminating if such use was permitted. On the other hand, were the "over-reactionaries" who immediately excluded the Boy Scouts from their public schools. After a year has passed, perhaps, some sanity has set in.

There has been at least one federal court decision since *Boy Scouts* that has addressed this issue. The case is *Boy Scouts of America v. Till*, 136 F. Supp. 2d 1295 (S.D. Fla. 2001). The Broward County School Board permits many organizations, including athletic clubs, churches, private membership groups and others to use school facilities after hours. The Board also has an "anti-discrimination" policy that prohibits use by organizations that discriminate, *inter alia*, on the basis of sexual orientation. The local arm of the Boy Scouts used the facility after hours as did many other groups. In 1998, the Boy Scouts and the Board entered into a five-year agreement that allowed a "school night for scouting" at school facilities and allowed administrators to assist scouts in promoting the event during school hours. After the United States Supreme Court decision, the School Board terminated the agreement and no longer allowed the scouts to rent and lease school facilities like other groups. The Boy Scouts sought a preliminary injunction to prevent the School Board from denying them use of the facilities after hours based on their membership policies regarding homosexuals. The Court granted the Boy Scouts' request for a preliminary injunction.

Among other buildings, 57 elementary schools were used for Scout meetings. No other group had its rights terminated based on the application of any nondiscrimination policy.

The Court had found that the district created a limited public form by permitting many other organizations to use its facilities for after hour use and would not deny that use to the Boy Scouts solely because the district disagreed with the Boy Scouts' membership policies.

The Court noted that:

> "A specialized First Amendment jurisprudence has developed around secondary and elementary schools, reflecting the unique institutional function of school facilities in the community and in our society. (Citations omitted, as are other quotes covered elsewhere in this presentation.) . . . . However, unlike cases where the Court has given schools more control over their own message and teachings . . .. here, we are dealing with a limited public forum created by the School Board itself.
>
> Further, the speech the School Board wishes to regulate is not student speech taking place during school hours, but rather the speech of a private organization wishing to exercise the expressive association rights during non-school hours . . . .
>
> Moreover, the action taken by the School Board barring the Boy Scouts from use of school facilities does nothing to stop the possible exclusion of students or teachers from scouting. If its purpose is to stop discrimination, the method chosen by the Board is ineffective. Under the law, when government seeks to regulate speech based upon its content, the regulation must achieve the stated governmental purpose, it must be narrowly tailored, and it must be the least restrictive alternative available (citation omitted)."

The Court concluded that the exclusion of the Boy Scouts based on their anti-gay viewpoint could not pass constitutional muster.

CONCLUSION

It is difficult to give the "black and white" answer our school administrators have always expected of those of us who are attorneys. Quite frankly, there is none on this topic. As any good politician would say when asked his or her opinion on the matter, "some of my friends are for it and some of my friends are again' it, and I am for my friends."

Suffice it to say that the materials contained herein should help one along the "slippery slope," whichever way one chooses to go. Is more deference afforded to school authorities with respect to First Amendment rights in elementary schools than at other levels? Probably.

During the 1998-1999 school year, AW was enrolled as a third-grade student at the L.T. Elementary School ("the School"). Each year, the third grade classes at the School District go on a field trip to the Shriner's Circus. AW's class was scheduled to attend the Shriner Circus on April 7, 1999, in Wilkes-Barre, Pennsylvania. When AW learned of the trip, she became unhappy because she believed that circuses engaged in acts of cruelty to animals. Accordingly, she prepared a handwritten petition that stated "We 3rd grade kids don't want to go to the circus because they hurt animals. We want a better field trip." On February 4, 1999, AW brought her petition to school and circulated it among her classmates, discussing with them how circuses are cruel to animals and obtaining their signatures on the petition. The first time she obtained signatures was on February 4, 1999, during recess on the school playground. Approximately, thirty students signed the petition. AW did not request permission to circulate the petition. The following day, February 5, 1999, AW again circulated her petition at recess and obtained an additional three signatures. There is a dispute as to what actually occurred during that recess period. Defendants contend that Defendant PC, a teacher at the School, noticed a large group of students around AW near an icy patch on the playground and proceeded to investigate. On the way, PC encountered a crying child who had fallen on the ice and sent her to the school nurse. Defendants allege that PC then requested AW to put away the petition and "writing utensils" because someone would get hurt. Plaintiff's version is that there was no ice near her and that she was ordered to stop circulating the petition because she could not have a petition at school. Plaintiff alleges that she became very upset when told that she could not circulate her petition and spent a part of the day in the school nurse's office in tears. There was also an incident that occurred during one of AW's classes. Although the details of what exactly happened are disputed, both sides agree that AW's teacher, told her to put away a folder which contained the petition and some other non-related material.

Plaintiff alleges in her Complaint that Defendant S. Simon ("Simon"), principal of the school, became aware of the petition on February 4, 1999, and instructed the teachers that if AW was observed circulating the petition, she should be told that she is prohibited from doing so on school property. Simon is further alleged to have instructed the teachers that the children are to be prohibited from taking pencils onto the school playground so as to prevent AW from pursuing her petition.

When AW returned home and told her mother (a PETA person) what happened at school, AW's mother called Simon, who allegedly stated that AW could not pass the petition around school. Unsatisfied with the response from Simon, AW's mother called the president of the school board about the incident. AW's parents then retained counsel, who wrote to the School Board President and Superintendent about the incident. In a letter dated February 19, 1999, the District's solicitor wrote to Plaintiff's then counsel. That letter stated in relevant part:

> In regard to stopping the circulation of a petition among third-graders on school property during the school day, there appears to be an erroneous assumption about the basis and motives for that action. Your letter presents interesting extracts from Tinker v. Des Moines Independent Community School District, 398 U.S. 503 (1969), however, this is not the case in which school authorities took a punitive action "to avoid the discomfort and unpleasantness" of differing views on visiting a circus. On the contrary, AW has expressed and continues to express her personal views on the circus trip. The school has no authority and no desire to curtail her free expression of such views. However, AW's activities briefly

disrupted classroom instruction and may have contributed to a situation where another child fell down during recess and was subsequently examined by the school nurse. According to the information we have at this point, the petition was never taken from AW. She was told to put it away. Elementary schools are not generally the environment for petition circulation, particularly where parents are unaware of such activities. It is incumbent upon school authorities, particularly in an elementary school setting, to preserve an appropriate environment focused on the institution's instructional objectives.

In a letter dated February 25, 1999, the District's Solicitor provided Plaintiff's counsel with a copy of the District's policy on student expression (Policy 220) which requires submission of all materials to be provided a "reviewer" prior to their distribution. If the reviewer "cannot show within two school days that the materials are unprotected, such material may be distributed." Plaintiff's counsel responded to the District's Solicitor claiming a presentation given to the School Board by AW's mother's constituted a request and that, not having heard anything within two days, AW was then free to circulate her petition. On February 22, 1999, AW's mother spoke to the School Board about her concerns with the planned Circus field trip and the petition incident. The Solicitor responded that the presentation at the Board meeting did not constitute presentation to the reviewer and that the proper procedure would be for AW to present the petition to Simon for approval. There are no allegations that this procedure was ever taken up with Simon. Plaintiff asserts, rather, that the Solicitor's raising this policy occurred long after AW was made to stop circulating her petition at school and that the policy was not enforced by the District.

The third grade class did attend the circus on April 7, 1999. AW, however, did not. She stood outside the circus and protested animal abuse with her mother (who was arrested). Having received prior approval to do so, on April 8, 1999, AW distributed coloring books and stickers regarding the circus and animal abuse to the third grade class. Plaintiff maintains that, although some children took the material, more would likely have but they were too intimidated by school personnel to do so. The events concerning AW and her attempt to protest what she perceived to be cruelty to animals received local media attention, including her appearance on the local television news and in local newspapers. AW was teased and taunted by her schoolmates, and older schoolboys who on the bus said things like "kill the animals" and "torture the animals." AW claims that these events cause her severe emotional distress for which she sought professional help.

Query:

1. Should the school board president be subject to individual liability?
   YES NO
2. Are all individual dependants entitled to qualified immunity?
   YES NO
3. Did the school district violate AW's First Amendment free speech rights?
   YES NO
4. Did the school district violate AW's First Amendment right to petition for redress of grievances?
   YES NO
5. Did the school district violate AW's First Amendment right to free association?
   YES NO

6. Was AW entitled to damages/relief on an emotional distress claim when other students allegedly harassed her?

YES NO

7. Would your answer be any different if the record established that Plaintiff's mother, Ms. Pita, who is a strong PETA pusher and leader of her own animal rights group constantly interfered with school operations, constantly evaded security measures to get into school, constantly appeared in school and classes during instructional time and constantly breast fed her 2-year old son in classrooms and the faculty lounge, and constantly refused to follow directives as to parental visits to school?

F:\USERS\SSR\HYPOTHET.WPD

COPING WITH THE "STAY-PUT" RULE WHEN EDUCATING THE DANGEROUS STUDENT

Darryl L. Farrington
SEMPLE, MILLER & MOONEY, P.C.
The Chancery Building, Suite 1308
1120 Lincoln Street
Denver, Colorado 80203

A. Introduction.

1. When a student with disabilities exhibits behavior viewed by school staff as dangerous to himself/herself or others, the conventional solution is to change the student's placement/program in ways that reduce the risks to acceptable levels. This may be done by:

   a. Isolating the student from staff and other students;

   b. Changing the physical characteristics of the educational setting;

   c. Introducing or intensifying behavioral management and behavioral modification measures; or

   d. Placing the student with other similar students in a program targeted to their needs.

2. A legal issue arises when the child's parents oppose such changes, and invoke IDEA's "stay-put" rule, 20 U.S.C. §1415(j). "Stay-put" means that, during due process and appeal proceedings, the school district may not implement any change that alters the student's program so materially that it amounts to a change of placement. The primary focus of this outline is to discuss the the measures that are affected by "stay-put" and those that are not, and to suggest ways school districts can avoid or cope with the "stay-put" rule in dealing with dangerous students. First, however, we need to understand what "dangerous" means, in the context of primary and secondary schools.

B. **"Dangerous" = "Substantial Likelihood of Injury."** Except when drugs or weapons are involved, a school district cannot change a student's placement on grounds of endangerment, even temporarily, unless it has the parents' consent, or can convince a hearing officer or judge that the student is substantially likely to injure himself/herself or others in his/her current placement.

1. In evaluating whether a student meets the test of dangerousness, be mindful that, in any court or administrative proceeding contesting the issue, the district bears the burden of

proving by "substantial evidence" that the "substantial likelihood" of injury exists. 20 U.S.C. §1415(k)(2)(A).[1]

a. Documented incidents of actual injury.

b. Documented incidents of attempted injury.

c. Patterns versus one-time incidents.

2. The injury doesn't necessarily have to be "serious" injury, but the less serious it is, the more frequent it will need to be.

   a. A documented pattern of repeated hitting, kicking, spitting, head-butting, scratching, and pushing, even where no injury requiring medical attention was inflicted, is sufficient. Community Consolidated School District 75, 30 IDELR 448 (SEA Ill. 1999).

   b. There was not a substantial likelihood of injury when a student had thrown objects twice, hit a teacher once, and made threats. Scranton School District, 29 IDELR 133 (SEA Pa. 1998).

3. Evidence of threats alone usually is not sufficient.

   a. Where a student had made a number of threats, but had never been known to act on any of the threats, threats alone did not constitute a "substantial likelihood" that the student would injure the person threatened. Scranton, *supra.*

   b. Threats may be sufficient when

      i. There is evidence that the child has followed through on a past threat

---

[1] The cited IDEA section applies to removal to an alternative educational setting (AES), and to emergency removal under Honig v. Doe , *infra.* In an action in which a permanent change in placement is disputed, the burden and proof standard may be somewhat less onerous.

ii. There is evidence that the child has taken material steps toward carrying out a threat (e.g. acquiring a weapon; trying to organize others to help him carry out threat). See, Haxtun (CO) Sch. Dist. #RE-2J, 32 IDELR ¶178 (OCR 1999) (threats of violence followed by bringing knife to school[2])

4. The district bears the burden of showing that it has made reasonable efforts to minimize or mitigate the risk of harm in the current placement. 34 CFR 300.521(c).

5. Bringing drugs or weapons to school or a school function is "dangerous per se." The district may move the child to a more restrictive setting without proving substantial likelihood of injury. 20 USC 1415(k)(1) and (10).

C. **Methods of Dealing with Dangerous Students That Do Not Change the Placement.** The "stay-put" rule applies only to situations in which the school district proposes to change the child's placement. Therefore, the easiest way to avoid the impact of the rule is to deal with the dangerous student without changing his/her placement. Further, methods that do not change the placement may constitute required mitigation of risk of harm.

1. Short-term removal (suspension). A student can be sent home or otherwise removed from his/her program for up to ten consecutive school days or more non-consecutive days throughout the academic year, as long as nondisabled students would be suspended for the same infraction. 34 C.F.R. 300.519.

   a. Can be used to diffuse a threatening situation

   b. May "get through" to student and result in behavior change

   c. Can be used repeatedly as needed, as long as it is not done so much that the child's contact with the curriculum is seriously compromised, and it is not a "pattern" (e.g., suspend nine days, one day back, suspend nine more days).

   d. Care must be taken to ensure that suspension does not conflict with behavior plan, as when plan indicates that suspension actually rewards and reinforces unwanted behavior.

2. Behavior Plans; The FBA and the BIP. 34 C.F.R. 300.520(b)(1)

   a. Functional Behavioral Assessment (FBA) may help the school staff get a handle on the behavior and suggest means of changing it.

   b. The Behavior Intervention Plan (BIP) if based on a sound FBA, may head off or neutralize dangerous behavior.

---

[2] While the knife would have been sufficient in and of itself to justify the removal to a 45-day AES under IDEA, OCR seemed to consider the threats as important in the equation for 504 purposes, particularly since they occurred in the wake of the Columbine incident.

    ii. Plan should include available techniques and strategies

    iii. Plan must implemented correctly.

    Parents may concede injurious behavior, but argue that the child should not be removed because the District had not applied the behavior plan strategies consistently and correctly, and that almost all of the behavioral incidents had occurred at a time when the District staff had failed to follow the plan as designed.

3. Supplemental aids and services. (See item B.4. above.) The introduction of supplemental aids and services (SAS) should not be considered changes in placement, but are necessary elements to *prevent* having to change the placement. However, they should be referenced in the IEP, and the IEP team would need to determine the nature and extent of the SAS. See, e.g., Oberti by Oberti v. Bd. of Ed. of Borough of Clementon Sch. Dist., 19 IDELR 908 (3rd Cir. 1993). Examples include:

    a. Part-time aide (Sacramento City Unified Sch. Dist. v. Rachel H. by Holland, 786 F. Supp. 874, 20 IDELR 812 (E.D. Cal. 1992).[3]

    b. Curriculum Modifications. Decreasing the challenge posed by schoolwork can reduce "refusal behaviors" that often escalate into violence.

    c. "Time-out." Removals to "time-out" location within the building, which may be considered both a BIP element and an SAS element, do not constitute a change in placement as long as

        i. The time of each removal is limited to the duration necessary to address a short-term behavioral need; and

        ii. The student is returned to the educational setting prescribed in his/her IEP as soon as practicable after each removal.[4]

    d. Physical restraints.[5]

---

[3] The Holland court based its refusal to remove Rachel from the general classroom partly upon expert testimony that Rachel did not require a full-time 1:1 aide, but only a part-time aide. The so-called Holland Rule states that if a child requires a full-time 1:1 aide to remain in the general classroom setting, the district has the option of moving him/her to a more restrictive setting (such as a self-contained classroom) if it can prove its preferred setting is less costly (taking all cost-factors into account) than providing a 1:1 aide.

[4] Some states require a school district to have a specific policy with regard to the use of time-out rooms, and prescribe guidelines, including the physical characteristics and use protocols for such facilities. See attached Guidelines for the Use of Non-Exclusionary and Exclusionary Time-Out, Colorado Department of Education 2000.

[5] Some states have adopted regulations defining the circumstances in which restraint is permitted, and requiring training and certification of staff authorized to employ restraints. See attached Colorado regulation, 1 CCR 301-45, 2620-R-1.00, *et seq.*

e. Counseling/behavioral instruction

  i. Social stories

  ii. Replacement behaviors

  iii. Mediation with peers

f. Administrative transfer to a different building[6]

  i. IEP does not change

  ii. Be prepared for neighborhood school fight

D. **Methods that Do Change the Placement**. When the above measures fail, a longer term removal from the current placement may be necessary.

1. Expulsion. A school district may expel a student with disabilities on three conditions. 34 C.F.R. 300.524, 300.121(d)

  a. The behavior resulting in expulsion is not a "manifestation" of the student's disability.

  b. The school district would expel a nondisabled student for the same infraction.

  c. The school must continue to provide FAPE, though not in the LRE. The IEP team determines the location and elements of the expulsion program.

2. Alternative Educational Setting (AES).

  a. For a weapons or drugs offense (see item B.5. above), school staff have unilateral authority to remove to an AES. 34 C.F.R. 300.520(a)(2) The IEP team determines program and setting

  b. For anything else, a hearing officer may order the child removed to an AES via an expedited hearing if the district meets its burden of proving substantial likelihood of injury, and nondisabled students would be removed from school for same infraction. 34 C.F.R. 300.521

---

[6] For example, Colorado regulations allow administrative change of location of services without notice or an IEP meeting as long as the IEP does not change. 1 CCR 301-8; 2220-R-5.04.

c. Characteristics of AES: 34 C.F.R. 300.522

  i. Location and program determined by the IEP team.

  ii. Must include instruction in general curriculum and IEP, as well as behavioral element.

  iii. Is no more than 45 days, but may be "repeated" by hearing officer, 34 C.F.R. 300.526(c)(4), or extended by agreement with the parents.

d. Types of AES

  i. Alternative school (including "expulsion school"-style facility).

  ii. Center-based program or day-treatment program that district intends as placement until the end of the year (or IEP cycle).[6]

  iii. Self-contained classroom in same building or a different building

  iv. Home-bound (including community settings within district boundaries)

3. Judicial removal. A school district may forego the expedited due process hearing, and proceed directly to the local district court for an injunction (including a temporary and preliminary injunction) to exclude the dangerous student from school. Honig v. Doe, 484 U.S. 305, 108 S.Ct. 592, 98 L.Ed.2d 686, EHLR 559:231, 43 Ed.Law Rep. 857 (1988) (student was enjoined where he had broken school-building windows and choked a classmate, causing abrasions).

  a. This may provide quicker action, when hearing officers are slow about scheduling so-called "expedited" hearings.

  b. The burden and criteria for decision are the same, i.e., substantial evidence of substantial likelihood of injury (Honig, *supra*)[7]

---

[6] In this approach, the AES is identical to the permanent placement the district proposes. It has both advantages and disadvantages. An advantage is that it places the child into a full-service model program, and is presumably better for the student than other types of AES. A disadvantage is that it creates an opportunity for the placement to "fail" with the student prior to the hearing on the merits, which might eliminate the district's best placement option.

[7] Courts unfamiliar with special education law may be more comfortable with traditional equitable criteria, as follows: (A) whether it is probable that the school district will ultimately prevail on the merits of the case (i.e., win a due process hearing challenging the permanent change of placement) (B) whether there is a substantial risk of "irreparable harm" if the student remains in his/her current educational setting; (C) whether the potential harm if the student stays in school is worse than the potential harm to the student caused by removing him/her; and (D) whether an injunction removing the child from school is in the public interest. Plan on being able to prove case "both ways."

c. Honig has been interpreted as requiring *either* injury resulting in medical attention or property damage before injunction will be granted. Phoenixville Area Sch. Dist. V. Marquis B., 25 IDELR 452 (E.D. Pa. 1997). But see, School Board of Pinellas County v. J.M., 957 F. Supp. 1252, 117 Ed.Law Rep. 547 (M.D. Fla. 1997) (district prevailed after it showed more than forty documented incidents of spitting, kicking, hair-pulling, throwing objects, and sexual touching); Walton Cent. Sch. Dist. V. Kirk, 28 IDELR 597 (N.D.N.Y. 1998) (injunction granted where student punched, kicked, and bit principal and teachers, made death threats to other students) in which neither property damage nor medical treatment occurred.

d. There is no 45-day limitation on the judicial removal, but the district will need to act in an appropriately expeditious manner to identify and implement a placement that can serve the student. During any period of delay, the district should be prepared to offer a home-bound program that meets the requirements of an AES placement (See item I.D.2.c.ii.), unless there is a demonstrable danger to staff in delivering such service.

e. Courts will generally require a pattern of behavior, as well as efforts to mitigate the danger, before granting injunction. Sch. Dist. of Philadelphia v. Stephen M., 25 IDELR 506 (E.D. Pa. 1997) (injunction denied where student had cut another student with a razor blade in isolated case in which there was a claim of specific provocation, and the district had failed to show that it had attempted to mitigate the danger.)

E. Summary.

School districts have a duty to mitigate the danger posed by a particular student in his current educational placement before seeking removal to a different setting on a temporary or permanent basis. The duty to mitigate mandates significant interventions that may be implemented pursuant to a behavior plan, and/or IEP in accordance with the requirement that "supplemental aids and services" be provided. Key services that can be implemented without changing a student's placement, and therefore without triggering the "stay-put" rule, include the use of a shadow aide, time-out, physical restraints, behavioral instruction/counseling, and *may* include administrative transfer to a different building as long as the placement on the LRE continuum and IEP services do not change. When it is necessary to change a child's placement, whether by expulsion or ordinary means, the "stay-put" rule can be avoided by petitioning an impartial hearing officer for removal to an alternative educational setting in renewable 45-day increments, or by seeking a court injunction. In either approach, the District must prove by "substantial evidence" that a "substantial likelihood of injury" exists if the student remains in the current placement. This burden and standard of proof require that the District show a documented pattern of injurious behavior, and sufficient efforts to mitigate the harm before seeking removal.

GUIDELINES FOR THE USE OF NON-EXCLUSIONARY AND EXCLUSIONARY TIME-OUT

with youth 3-21 years old receiving public education services

"Time-out" is a popular phrase used in many different ways by educators, administrators, parents, mental health service providers and other personnel involved with youth in public education settings. The definition may vary, however, from individual to individual. For the purposes of these guidelines, time-out shall be defined in the following ways:

Non-exclusionary time-out is defined as the removal of reinforcers (*e.g.*, preferred activity, teacher attention) from the child/youth. There are two levels of non-exclusionary time-out; planned ignoring and removal of reinforcement.

a. ***Planned ignoring*** is the removal of social reinforcers, such as teacher or classmate attention, physical contact, or verbal interaction for a brief period of time (10-60 seconds)* when the student engages in undesired behavior.
b. ***Removal of reinforcement*** is the removal of materials the student is interacting with for a period of time (1-3 minutes)*.

Exclusionary time-out is defined as the removal of the child/youth from the reinforcing conditions. Non-exclusionary time out is less intrusive and should be tried first. Exclusionary time-out has three levels. Listed from the least to the most intrusive, these include contingent observation, exclusion time-out, and isolation time-out.

a. ***Contingent observation*** is the removal of the child/youth from the current environment to another location in the room or setting. The student still observes ongoing or instructional activities but may not participate in them. Optimal time limits are 30-60 seconds*.
b. ***Exclusion time-out*** is the removal of the child/youth from the current environment to another location within the same room where the student cannot observe ongoing activities. Examples of exclusion are sitting behind a partition or sitting in a corner. Time effective in changing behavior will vary according to the age of the student. According to research, the maximum effective time is 2-5 minutes*.
c. ***Isolation time-out*** is the isolation of the child/youth from all probable reinforcers by being placed in a different room under the constant supervision of a qualified staff. Isolation requires a previously defined time duration. The length of time should not exceed one minute per year of age of the student with a maximum of 12 minutes*.

Seclusion time-out is defined as placement of a student alone in a locked room. These guidelines are not intended to address seclusion time-out. Rules around the use of seclusion are defined in the Colorado Code of Regulations at 1 CCR 301-45.

---

*Although all times included here are based on research and presented as guidelines, it should be understood that, based on individual student needs, times may vary. In all instances, the briefest, effective time should be utilized.

Time-out, used appropriately with forethought, can provide an effective response to challenging behaviors. However, the use of time-out must be planned and purposeful and not as an act of retribution or respite for the teacher. The following guidelines have been documented as recommended practice in the literature (Gast & Nelson, 1977; Nelson & Rutherford, 1983; Yell, 1994; Ewing, 1998) and based on federal court decisions.

1. Time-out must serve a legitimate educational function.

Classroom management techniques, as well as individual student behavior interventions, should maintain a constructive focus that results in an effective and positive educational environment. The intent of any behavior or discipline intervention is not merely to reduce or control undesired behaviors, but to instruct in the acquisition of appropriate replacement behaviors. It is critical that educators determine if time-out, as with any behavior strategy used, is effective in changing the behavior of concern. If changes do not occur or the behavior intensifies, educators should consider alternative interventions.

2. Time-out should be used only in a manner commensurate with recommended practice and proportionate to the intensity of the behavior.

Time-out should never be used as a punishment. Rather, time-out should be considered a technique that may be employed to allow the student time away from the situation to reflect and regain composure. The outcome of time-out should be a reduction in the undesirable behavior.

- Excessive duration of any given time-out is not supported by research and can be counter-productive in reducing challenging behaviors. Therefore, the time, duration and release criteria should be determined before the time-out is imposed. (see page 1 for suggested times).
- The frequency and duration of time-out should be closely reviewed and evaluated to assure that no individual student is in isolation time-out on a chronic basis. If this appears to be happening, then the effectiveness of the procedure with a particular student is highly questionable and alternative behavioral interventions should be explored.

3. In the case of students who are receiving special education services, the IEP team should be involved in making decision concerning the use of behavior reduction procedures such as time-out.

The Individuals with Disabilities Education Act of 1997 (IDEA) requires that the Individualized Education Program (IEP) team consider positive behavior support for a student whose behavior impedes his/her learning or the learning of others. When behavior reduction strategies are being considered, the IEP team should determine the instruction students need to learn new, more acceptable behaviors (replacement behaviors). In addition, excessive removal from the classroom of a student receiving special education services may constitute a change of placement. This situation requires that the IEP team meet to:

- review the student's supports and services,
- determine adequacy of those supports and services, and
- make the necessary adjustments as needed.

4. Align local policies (district, school, agency) with state guidelines regarding the use of time-out.

To ensure the appropriate use of time-out, districts and facilities may choose to adopt, meet or exceed the Colorado Department of Education guidelines (*i.e.*, develop guidelines that restrict or prohibit the use of specific levels of time-out). Local policies should include procedures for the use of non-exclusionary and exclusionary time-out. Specific procedures must address the use of isolation time-out and parameters for the physical space to be used.

5. Written classroom procedures should be developed prior to the use of time-out.

When considering the use of time-out, educators should establish:

- a set of rules, which have been taught to all students, with clear expectations and consequences,
- a hierarchy of planned responses to behaviors of concern, from least to most intrusive,
- identified areas where time-outs will occur, considering locations both in and out of the current setting,
- a process for training other personnel (*e.g.*, paraeducators, volunteers, support staff) in the procedures related to the use of time-out,
- a process for documenting the use and effectiveness of the time-out strategy,
- a process for obtaining parent or caregiver permission prior to the use of isolation time-out,

  Note: If parent/caregiver permission has not been obtained, isolation time-out may only be used in an emergency. Emergency is defined as serious, probable, imminent threat of bodily harm to self or others where there is present ability to effect such harm (CRS 26-20-102).
- a process for documenting the use of time-out, including but not limited to date, time, behavior which precipitated the use of time-out, length of time in isolation time-out and results of the procedure,
- an opportunity to allow the student to process with an adult, and
- methods which allow the student to re-enter the setting in a positive way.

If isolation time-out is used, the following cautions should be considered:

- Isolation time-out should not be accomplished by forced or physical coercion of a student into the "time-out" area. This often results in a power struggle that serves to initiate or escalate a student's physical aggression, poses an increased risk of harm to both student and staff and could be interpreted by the student that physical control is legitimate.

- A student should not be placed in a time-out area where they cannot be visually observed by a responsible staff person(s) trained in the procedures.

- The specific room used for isolation time-out should meet the following criteria:

  An adequate opening to view the student
  Adequate lighting
  Adequate size (no smaller 6 feet X 6 feet with normal ceiling height)
  A non-injurious environment, which may include carpeting or padded surface and no loose furniture
  An **unlocked** door

To conclude, time-out is a safe, legal strategy which can be effective if used with caution, care and concern for the student's welfare. However, greater consideration should be given to the array of positive interventions that can maximize student learning and assist in the acquisition of replacement behaviors.

References

Gast, D.L. & Nelson, C.M. (1977). Timeout in the classroom: Implications for special education. *Exceptional Children*, 461-464.

Neslon, C.M. & Rutherford, R.B. (1983). Timeout revisited: guidelines for its use in special education. *Exceptional Education Quarterly*, 3, 56-67.

Ewing, T.S. (1998). Time-out: Guidelines for teachers. In A.S. Canter & S. A. Caroll (Eds.) *Helping children at home and school: Handouts from your school psychologist*, pp. 355-357. National Association of School Psychologists: Bethesda, Md.

Yell, M.L. (1994). Timeout and students with behavior disorders: A legal analysis. *Education and Treatment of Children* 17(3), 293-301.

Colorado State Board of Education
Department of Education

1 Colorado Code of Regulations 301-45

Adopted: December 14, 2000

Attorney General Opinion: December 18, 2000

Statutory Authority: C.R.S. 26-20-108, C.R.S. 22-2-107(1)(a) and 22-2-107(1)(c)

RULES
FOR THE ADMINISTRATION OF THE PROTECTION OF PERSONS FROM RESTRAINT ACT

2620-R- 1.00 STATEMENT OF BASIS AND PURPOSE

1.00(1) These Rules were developed in accordance with C.R.S. 26-20-101, et seq. Specific statutory authority for the development of these Rules comes from C.R.S. 26-20-108. These Rules are provided pursuant to the terms of the "Protection of Persons from Restraint Act". These Rules outline the procedures to be followed in the administration of restraint, staff training, documentation requirements, and the review of the use of restraint.

2620-R- 2.00 DEFINITIONS

2.00(1) "Restraint" means any method or device used to limit freedom of movement, including but not limited to bodily physical force, mechanical devices, chemicals, and seclusion. The holding of a student for any length of time with any purpose or intent other than providing safety and/or comfort and support is considered a restraint.

2.00(2) "Physical Restraint" means the use of bodily, physical force to limit an individual's freedom of movement. "Physical Restraint" does not include holding of a student for less than five minutes by a staff person for protection of the individual or other persons. Holding, appropriate to the student's age, may only be used if the purpose and intent is to provide safety and/or comfort and support to the individual/student.

2.00(3) "Seclusion" means the placement of a student alone in a room from which egress is prevented. Seclusion does not mean:

2.00(3)(a) placement of a student in residential services in his or her room for the night; or

2.00(3)(b) use of time-out as defined by written policies, rules, procedures or guidelines developed by the Department of Education.

2.00(4) "Chemical Restraint" means giving an individual medication, prescribed by their doctor, for the purpose of restraining that individual; or chemicals or drugs, including prescription medication, orally administered on an "as needed" basis to limit the physical freedom of the student. Chemical restraint does not include:

2.00(4)(a) prescription medication that is regularly administered to the student for medical reasons rather than to restrain the student's freedom of movement (e.g. Asthma-Cort); or

2.00(4)(b) the administration of medication pursuant to section 27-10-111 (4.5), C.R.S., or administration of medication for voluntary or life-saving medical procedures.

2.00(5) "Emergency" means serious, probable, imminent threat of bodily harm to self or others within the education environment. Emergency situations may exist when a student is destructing property which could lead to harm to the student or others.

2.00(6) "Mechanical Restraint" means a physical device used to restrict the movement of an individual or the movement or normal function of a portion of his or her body. "Mechanical Restraint" does not mean the use of protective devices or adaptive devices for providing physical support, prevention of injury, or voluntary or life-saving medical procedures.

2.00(7) Public education programs, agencies, or services shall mean public schools, public school-sponsored events, collaborative education programs and programs serving publicly funded students, such as approved private special education schools and including the Division of Youth Corrections and its contracted programs. The Department of Corrections (adult corrections) or any public or private entity that has entered into a contract for services with the Department of Corrections is not included.

2.00(8) "School Day" means any day or partial day that students are in attendance at the public education programs, agencies or services or sponsored events.

2620-R- 2.01 BASIS FOR THE USE OF RESTRAINT

2.01(1) Restraints shall only be used in an emergency and with extreme caution and is limited to situations in which there is serious, probable and imminent threat of bodily harm by a student with the present ability to cause such harm.

2.01(2) In all other situations less restrictive alternatives including, but not limited to, positive behavior supports, constructive, non-physical de-escalation and re-structuring of the environment shall be used.

2.01(3) School personnel shall:

- 2.01(3)(a) administer restraints only when needed to ensure the safety of the student and the school community, and only when needed to prevent the continuation or renewal of an emergency, in accordance with Section 2.01(1) of these Rules;
- 2.01(3)(b) use restraints only for the period of time necessary to accomplish its purpose and using no more force than is necessary; and
- 2.01(3)(c) prioritize prevention of harm to the student if a restraint is administered.

2.01(4) Restraints must never be used as a punitive form of discipline or as a threat to control or gain compliance of a student's behavior.

2.01(5) Devices intended for physical/occupational therapy uses must never be used as a mechanical restraint.

2620-R- 2.02 DUTIES RELATED TO THE USE OF RESTRAINT

2.02(1) General guidelines

- 2.02(1)(a) When restraints are used, the public education program shall ensure that:

2.02(1)(a)(i)	restraint will be administered by staff who have been trained to assure the physical safety of the student;
2.02(1)(a)(ii)	no restraint is administered in such a way that the student is prevented from breathing or communicating;
2.02(1)(a)(iii)	no restraint is administered in such a way that places excess pressure on the student's chest, back, or extremities;
2.02(1)(a)(iv)	restraints are administered only by those who have received training, in accordance with Section 2.03 of these Rules;
2.02(1)(a)(v)	a student's behavior plan or IEP must address the specific circumstances, procedures and staff involved if there is a possibility that restraint might be used as part of crisis management;
2.02(1)(a)(vi)	opportunities to have the restraint removed are provided to the student who indicates that he or she is willing to cease the violent or dangerous behavior;
2.02(1)(a)(vii)	when the restraint is no longer necessary to protect the student or ensure the safety of others, the restraint must be removed; and
2.02(1)(a)(viii)	when it is anticipated that restraint will be used in an emergency situation written parent/guardian permission must be obtained.

2.02(2) Proper administration of specific restraints.

2.02(2)(a) "Chemical restraints" and/or "Mechanical restraints" may only be used according to policy and procedures approved by the agency's licensing or regulatory authority, and in accordance with a student's IEP or behavior support plan.

2.02(2)(b) "Physical restraint"

2.02(2)(b)(i) A person administering the physical restraint must use only the amount of force necessary to stop the dangerous or violent actions of the student.

2.02(2)(b)(ii) A restrained student must be continuously monitored to ensure that the breathing of the student in such physical restraint is not compromised.

2.02(2)(b)(iii) A student shall be released from physical restraint within fifteen minutes after the initiation of the restraint, except when precluded for safety reasons.

2620-R- 2.03 STAFF TRAINING

2.03 All public educational programs shall ensure that staff utilizing restraint in schools or facilities are trained. Training shall include:

2.03(1) a continuum of prevention techniques;

2.03(2) environmental management;

2.03(3) a continuum of de-escalation techniques;

2.03(4) nationally recognized physical management and restraint, including, but not limited to, techniques that allow restraint in an upright or sitting position;

2.03(5) methods to explain the use of restraint to the student who is to be restrained and to the individual's family; and

2.03(6) appropriate documentation and notification procedures.

2620-R- 2.04 DOCUMENTATION REQUIREMENTS

2.04(1) If restraints are used, a written report must be submitted within one (1) school day to school administration.

2.04(2) The school principal or designee shall verbally notify the parents as soon as possible but no later than the end of the school day that the restraint was used.

2.04(3) A written report shall be mailed, E-mailed, or faxed to the parent(s) within thirty-six (36) hours following the use of restraint and a copy placed in the student's confidential file.

2620-R- 2.05 REVIEW OF THE USE OF RESTRAINT

2.05(1) Each public education program shall ensure that a review process is established and conducted for each incident of restraint used. The purpose of this review shall be to ascertain that appropriate procedures are followed and to minimize future use of restraint. The review shall include, but is not limited to:

2.05(1)(a) staff review of the incident;

2.05(1)(b) follow up communication with the student and his/her family;

2.05(1)(c) review of the documentation to ensure use of alternative strategies; and

2.05(1)(d) recommendations for adjustment of procedures.

In the case of students who have behavior support plans identified in their IEPs, the IEP team, including the parent, shall meet to determine if the supplementary aids and services identified in the IEP are being provided, if those identified supplementary aids and services are appropriate and if changes to the behavior plan are needed.

2.05(2) Each public education program shall ensure that a general review process is established and conducted at least annually. The purpose of the general review process is to ascertain that procedures are appropriate. The review shall include but is not limited to:

2.05(2)(a) analysis of incident reports, including but not limited to procedures used during the restraint, preventative or alternative techniques tried, documentation and follow-up;

2.05(2)(b) training needs of staff;

2.05(2)(c) staff to student ratio; and

2.05(2)(d) environmental considerations, including physical space, student seating arrangements, and noise levels.

MANIFESTATION DETERMINATIONS FOR STUDENTS WITH DISABILITIES AFTER THE 1997 IDEA AMENDMENTS: Does The New Standard Work?

By: Amy K. Tchao, Esq.

DRUMMOND, WOODSUM & MacMAHON
245 Commercial Street
P.O. Box 9781
Portland, Maine 04104-5081
(207) 772-1941

Introduction

Perhaps one of the most important concepts to understand in the area of special education discipline today is the manifestation determination. Prior to adoption of the 1997 amendments to the Individuals with Disabilities Education Act ("IDEA '97"), the statute included no explicit language on manifestation determinations. It was generally understood, however, that if the misconduct in question was "related" to the student's disability, the procedural requirements of IDEA would apply. *See, e.g, Heumann Letter,* 22 IDELR 531(OSEP Apr. 26, 1995); *S-1 v. Turlington*, 635 F.2d 342, 350 (5th Cir.), *cert. denied*, 454 U.S. 1030 (1981). In practical terms, this meant that before a student with a disability could be expelled from school for misconduct, there would need to be a determination that the student's misconduct was not related to his or her disability.

Prior to IDEA '97, the standard of "relatedness" was somewhat vague, and occasionally led to bizarre results. *See School Board of the County of Prince William v. Malone,* 762 F.2d 1210, 1216 (4th Cir. 1985) (finding a drug sale to be related to a student's learning disability since low self esteem made the student a likely "stooge" for drug traffickers). With IDEA '97, however, Congress abandoned the amorphous concept of "relatedness" and instead adopted the term "manifestation determination," which focuses on whether the student's disability impaired his or her control or understanding in relation to the misbehavior. This general development appears to reflect a desire to clarify and establish meaningful, specific standards for determining what is required to obtain IDEA protections for student misbehavior.

Under IDEA '97 then, the purpose of the manifestation determination review meeting is to determine whether a particular behavior is a manifestation of the student's disability. Consistent with the practice before the 1997 amendments to IDEA, the regulations explicitly provide that if, as a result of a manifestation determination review, the behavior is determined not to be a manifestation of the student's disability, then the school district may apply the same disciplinary measures in the same manner as they

Copyright © 2001 Drummond Woodsum & MacMahon. These materials may not be reproduced without prior written permission.

would be applied to regular education students, provided that a student with a disability who is expelled from school or subject to a long-term suspension (*i.e.*, more than 10 cumulative days in a school year) must still be provided a free appropriate public education ("FAPE"). 34 C.F.R. § 300.524(a), § 300.121(d). There are a number of procedural and substantive parts to a manifestation determination review, both of which are equally important.

When Must A Manifestation Determination Review Take Place?

A manifestation determination must be done when a student with a disability has violated any school disciplinary rule or code of conduct and the recommended length of the disciplinary removal for the behavior is long enough to amount to a "change of placement." 34 C.F.R. § 300.523(a). A change of placement is:

1. Any *single* removal longer than 10 consecutive school days in a row.

   This would include, for example, a suspension for more than 10 consecutive school days; placement for more than 10 consecutive school days in an interim alternative setting (34 C.F.R. § 300.521); or an expulsion.

2. Any *series* of removals that "constitute a pattern because they cumulate to more than 10 school days in a school year, and because of factors such as the length of each removal, the total amount of time the child is removed, and the proximity of the removals to one another." 34 C.F.R. § 300.519(b).

   This definition is vague, and provides schools with no firm guidelines on when any such series of removals would reach this point, although there are a number of agency rulings that have concluded that a series of removals amounting to something more than 20 school days in length over a 2 to 3 month period would likely be a change of placement. *See, e.g., Cobb County (GA) School Dist.*, 20 IDELR 1171 (OCR Sept. 3, 1993); *Ponca City (OK) School Dist.*, 20 IDELR 816 (OCR Jul. 19, 1993). Because of the uncertainty around this time line, many school districts have accepted the practice of performing the manifestation determination review at the IEP Team meeting that must be scheduled in response to removals in excess of 10 cumulative school days in the school year. This somewhat conservative calculation would ensure that the school district is complying with the law, and may make calculations of time lines easier.

Copyright © 2001 Drummond Woodsum & MacMahon. These materials may not be reproduced without prior written permission.

The manifestation determination meeting must be held immediately if possible, but in no case later than 10 school days after the date on which the decision is made to recommend a long-term removal amounting to a change of placement, as described above. 34 C.F.R. §300.523(a)(2). Because of this 10-school day timeframe, there is no obligation to postpone the manifestation determination meeting beyond that time to accommodate the parents' schedule. The child's parents must be given notice of the decision to proceed with a long-term removal, on the same day that the decision is made, and must also be provided notice of procedural safeguards at that time. 34 C.F.R. §300.523(a)(1).

Who Must Attend The Manifestation Determination Meeting?

The regulations state that a manifestation determination must be conducted by the IEP Team and "other qualified personnel." 34 C.F.R. §300.523(b). The IEP Team includes: the parents or legal guardian of a child; a regular education teacher of the child; a special education teacher or service provider for the child; a representative of the school district who is knowledgeable about the general curriculum and the available school resources, and who is qualified to provide, or supervise the provision of, specially designed instruction to meet the child's unique needs; "an individual who can interpret instructional implications of evaluation results"; the child, if appropriate; and other individuals invited by either the parents or the district who are believed to have knowledge or special expertise regarding the child. 34 C.F.R. §300.344(a). "Other qualified personnel" could include, for example, a district designated facilitator, or an outside expert who may not have specific knowledge about the child, but who may have expertise in evaluating behaviors that are manifested to the child's identified disability.

What Must The Team Do At A Manifestation Determination Meeting?

At the manifestation determination meeting, the Team must do two things. First, it must consider all relevant information, in relation to the behavior subject to disciplinary action. Second, it must make a determination of the manifestation issue.

b. Consideration of relevant information.

This information includes:

a. Evaluation and diagnostic results;
b. Relevant information supplied by parents and the child;
c. Observations of the child; and
d. The child's IEP.
34 C.F.R. § 300.523(c)(1).

Copyright © 2001 Drummond Woodsum & MacMahon. These materials may not be reproduced without prior written permission.

At the meeting, the District may wish to summarize reports from the most recent triennial evaluation, and any other relevant diagnostic material contained in the child's file. The parent or District may also present any new evaluative or diagnostic information relevant to the relationship between the child's disability and the particular behavior at issue. Teachers, service providers, parents, and the child, where appropriate, should be asked to summarize their observations of the child's behavior subject to disciplinary action and its relationship, if any, to the child's disability.

The school district does not have the obligation to provide specific objective data to indicate that the behavior was not a manifestation of the student's disability; while such data may be useful and relevant, IDEA does not require that specific data of this type be presented. *See Independent School Dist.*, 31 IDELR 44, at p. 11 (SEA MN 1999) (hearing review officer overturned hearing officer's determination that student's involvement in bomb threat was not related to his disability, finding that hearing officer erred in increasing school's burden of proof beyond that required by statute). However, the Team should review and consider all aspects of the IEP that may be relevant to the subject behavior, including both academic and behavioral portions of the IEP. *See D.I. v. Dallas School Dist.*, 28 IDELR 1225 (SEA OR 1998) (manifestation determination flawed where district did not consider behavior portion of IEP.).

2) The Manifestation Determination.

Based on consideration of the above information, the Team then must make four specific determinations about the particular incident that prompted the disciplinary removal. Two of these four determinations are primarily procedural in nature, and two are primarily substantive.

The two procedural questions ask as follows:

a. In relationship to the behavior at issue, was the current IEP and placement inappropriate at the time of the behavioral incident?

b. Was the school failing to implement any services in that IEP (such as special education services, supplementary aids and services, and behavioral intervention strategies) at the time of the incident that may have applied to the behavior in question? 34 C.F.R. § 300.523(c)(2)(i).

Copyright © 2001 Drummond Woodsum & MacMahon. These materials may not be reproduced without prior written permission.

The point of these procedural questions is clear. If the Team concludes that the IEP was clearly inappropriate in relation to the disciplinary incident itself at the time of the incident, then the assumption is that the inappropriate IEP contributed to the incident. Likewise, if services in the IEP were supposed to address the behavior in question and were not being provided, the Team would conclude that the behavior was a manifestation of the disability.

The two substantive questions are just as important. They are as follows:

c. Did the student's disability impair his or her ability to understand the impact and consequences of the behavior subject to disciplinary action?

d. Did the student's disability impair his or her ability to control the particular behavior subject to disciplinary action? 34 C.F.R. § 300.523(c)(2)(ii)-(iii).

If the answer to any one of the four questions above is yes, then the behavior must be considered a manifestation of the student's disability, and further discipline in response to that incident must generally be addressed through the IEP Team process rather than through regular school disciplinary procedures. A copy of a sample Manifestation Determination Checklist is attached to this article.

As noted above, if the Team determines that the misbehavior is not a manifestation of the disability, then the school may use normal school disciplinary procedures to address the incident, the same as would be applied to non-disabled students, except that services must be provided during the removal time that will permit the student to continue to progress in the general curriculum and toward the student's IEP goals. 34 C.F.R. § 300.524(a), .121(d). The student's IEP Team is responsible for deciding what the components of that service package should be.

Just because behavior is a manifestation of the disability does not mean that it cannot be addressed by the school. It only means that the school's regular disciplinary procedures cannot be used. Instead, decisions about how to address such behavior are made by the IEP Team. For example, for severe behavior, the Team may conclude that the student needs to be in a more restrictive educational setting than previously, and may order such a placement.

Copyright © 2001 Drummond Woodsum & MacMahon. These materials may not be reproduced without prior written permission.

It is important to remember that a school district can always attempt to reach an agreement with the parents as to an appropriate placement for the child. If no agreement can be reached, the school can still place the student in an interim alternative educational setting for up to 45 calendar days (assuming this is the same consequence a regular education student would receive) for a drug or weapon offense without invoking the stay-put rule. 34 C.F.R. § 300.520. Furthermore, if maintaining the student's current placement is considered dangerous, then the school may request an expedited hearing to change the student's placement to an interim alternative placement for not more than 45 calendar days.[1] 34 C.F.R. § 300.521. In situations where the behavior is determined to be a manifestation of the student's disability because the IEP or placement is deficient, inappropriate or has not been implemented appropriately, the regulations make clear that the school "must take immediate steps to remedy those deficiencies." 34 C.F.R. § 300.523(f).

Decisions Interpreting Manifestation Determinations

Although the IDEA regulations address in general terms the who, what, when, where, and how of manifestation determination reviews, there are many questions that the regulations simply do not answer. Some of these important questions have been addressed in hearing officer or court rulings decided since the 1997 amendments to IDEA. Some of those decisions and the important questions raised by them are discussed below.

Court Decisions

a. *Parent v. Osceola County School Bd.*, 32 IDELR 144, 59 F. Supp.2d 1243 (M.D. Fla. 1999), *aff'd*, 220 F.3d 591 (11th Cir. 2000).

A student identified as emotionally handicapped and learning disabled, who had a history of behavioral problems in school, slashed another student's face with a box cutter. The Team conducted a manifestation determination meeting and found that the student's conduct was not a manifestation of his disability because he "planned and brought the weapon" on the bus. Following that determination, despite the principal's recommendation of expulsion, the student was placed in the district's alternative school for the remainder of the year where he performed well and earned passing grades in the behavior management program. A meeting was held to discuss the student's placement for the following school year. The school recommended

---

[1] A detailed discussion of "interim alternative educational settings" for dangerous behavior or drug and weapon offenses is beyond the scope of this article, but can be found in the accompanying materials of Darryl Farrington, Esq.

Copyright © 2001 Drummond Woodsum & MacMahon. These materials may not be reproduced without prior written permission.

continuation in the alternative school, and the parent requested due process. The administrative law judge found in favor of the school, and the parent appealed.

One of the parent's many allegations was that the manifestation determination meeting was not conducted in accordance with IDEA's procedural requirements. The court rejected this argument, stating that any alleged procedural violations could not have caused the student harm, since he was provided adequate educational benefits in the least restrictive environment at the alternative school throughout the relevant time period. The court did not reach the merits of the school district's determination that the student's conduct was not a manifestation of his disability.

b. *Richland School Dist. v. Thomas P.*, 32 IDELR 233 (W.D. Wis. 2000).

The student, a high school senior, participated in a vandalism spree that destroyed $40,000 worth of school property. Although denying any part in the actual act of vandalism, the student admitted to driving two other students to two elementary schools and being fully aware that the other students intended to vandalize school property. At the time of the incident, the student was identified as having a learning disability. Although he was progressing academically, he had received 54 disciplinary referrals for conduct ranging from truancy to disruptive behavior to insubordination.

The IEP Team conducted a manifestation determination and easily concluded that the behavior was not a manifestation of the student's learning disability; the school board voted to expel. However, the parent requested a due process hearing, had her son evaluated by a clinical psychologist who diagnosed the student with attention deficit disorder and dysthymia, and opined that these conditions resulted in his involvement in the vandalism incident. The administrative law judge considered this new evidence offered by the parent, and set aside the school's expulsion and determination that the student's conduct was not a manifestation of his disability. On appeal, the district court agreed.

In affirming the ALJ's decision, the district court made a number of important points, some of which are troubling for schools. First, in reviewing a manifestation determination, a hearing officer is not limited to considering only the information originally considered by the IEP Team at the manifestation determination review meeting. Thus, the new expert testimony presented by the parent at the hearing could be considered by the hearing officer. Second, the court concluded that the manifestation determination is not limited just to the student's disability identified by the school district at the time of the incident; thus, the IEP Team should consider both the identified disability for which services are already being provided *and* any "new" disability for which they are not. In this case, at the time of the vandalism incident, the student was identified as a student with a learning disability; as such he was

Copyright © 2001 Drummond Woodsum & MacMahon. These materials may not be reproduced without prior written permission.

receiving services for a different disability than the one he asserts led to the misconduct.

Third, in overturning the school's manifestation determination, the court (and ALJ below) relied heavily upon the testimony of the parent's expert that committing vandalism could be an impulsive, thrill-seeking act, that impulsivity is not limited to spur-of-the-moment decisions but could last for an entire evening, that children with ADD are chemically attracted to risk taking behavior because of the way they process information in the brain, that this particular student was "doing things that were exciting" and "wasn't thinking about the consequences," and that children with ADD and dysthymia "are easily swayed into making bad decisions."

The *Richland* case probably contains the most detailed discussion by a court of IDEA's manifestation determination provision to date, and is troubling for school districts on several fronts. Perhaps most ironic about the Richland decision is the court's final conclusion:

> This opinion should not be read to suggest that a student who commits reprehensible acts may avoid disciplinary action by running to a psychologist and obtaining a post-hoc diagnosis of attention deficit disorder.

32 IDELR 233, at p. 14. But one has to wonder if that isn't exactly what was done here, and ultimately, with the court's approval.[2]

c. *Randy M. v. Texas City ISD*, 32 IDELR 168, 93 F. Supp.2d 1310 (S.D. Tex. 2000).

A 13-year old male student with a learning disability, acting in concert with another male student, ripped the break-away wind pants off a female student while at school, thereby exposing the female student's underwear. After determining that the student's behavior was not a manifestation of his disability, the school district placed him in an alternative educational setting. The parents went to court, seeking to keep him in the last agreed upon placement. The court upheld the district's actions, noting that the district was justified in taking aggressive remedial action, as this was a "planned and intentional assault of a fellow student, particularly an assault with sexual overtones, a very serious infraction." 93 F. Supp.2d at 1310-11. The court

---

[2] The *Richland* court cited another court case interpreting manifestation determinations, *Doe v. Oak Park & River Forest High School*, 115 F.3d 1273 (7th Cir. 1997), to support its conclusion that the proper scope of the manifestation determination should have included consideration of the student's as-yet undiagnosed attention deficit disorder. In *Doe*, a case which arose prior to enactment of IDEA '97, the court agreed with the school's determination that bringing drugs to school was not a manifestation of the student's identified learning disability of his unevaluated ADHD, despite expert testimony that the behavior was triggered by "low self-esteem" resulting from the ADHD. *Id*. At 1281.

Copyright © 2001 Drummond Woodsum & MacMahon. These materials may not be reproduced without prior written permission.

also noted that the parents did not appear to be working in good faith with the school district since they had rejected the IEP Team's offer to give them the opportunity to gather and present evidence to the Team that the student "suffered from a previously unrecognized disability which may have been responsible for the pants ripping incident." *Id.* at 1311. Finally, the court made the following interesting observation:

> Randy's parents are faced with a truly difficult challenge: raising a learning disabled teenager beginning to manifest serious behavioral problems. The Court sympathizes with the parents' situation, and sincerely hopes that psychiatric treatment and other remedial measures are effective in addressing their son's problems. However, there is simply no evidence that the disciplinary actions of the District were in any respect inappropriate or denied Randy his constitutional rights to due process.

Id. Reading between the lines, the *Randi M.* court may have been sympathetic to the district's position in light of the Supreme Court's decision in *Davis v. Monroe County Board of Education*, 119 S. Ct. 1661 (1999), which only a year earlier had recognized a cause of action against school districts for student-to-student sexual harassment.

State Hearing Officer and Review Panel Decisions

Given the dearth of reported court decisions interpreting the manifestation determination provisions of IDEA, we are left to try to tease out the meaning of this term and its operation from a number of state due process hearing decisions. Several of these are summarized below.

Procedural Aspects Of The Manifestation Determination

a. ***Poteet Independent School Dist.*, 29 IDELR 423 (SEA TX 1998).**

This case involved a 15-year old ninth grade student with a learning disability and attendance problems. Despite efforts by the parents and school to try to get him to attend school, the student often chose not to attend or to leave before the end of the school day. The district addressed this through a number of interventions, including IEP Team meetings, counseling, developing a behavior intervention plan, and finally, filing truancy charges. Just before the end of the school year the student was caught on school grounds with marijuana. The IEP Team met and determined, over the parent's objection, that the student's conduct was not a manifestation of his disability.

Copyright © 2001 Drummond Woodsum & MacMahon. These materials may not be reproduced without prior written permission.

The hearing officer made some key points about the procedural aspects of the manifestation determination. First, although the parent attempted to challenge the accuracy of the school district's finding of marijuana possession, the hearing officer refused to substitute her judgment for that of the school administration on that issue and made clear that a due process hearing is not the proper forum for such a challenge. Second, any delay in the manifestation determination meeting was due to the parent's request for postponement and the district's attempts to accommodate the parent. Therefore, the procedural requirements for conducting a manifestation determination were met. Third and perhaps most important, the parent's assertion that the behavior intervention plan was not fully implemented was not sufficient procedural grounds to overturn the school's manifestation determination. The behavior intervention plan contained the requirement that a support person be named and found for the student to talk to when he was oppositional. Although the district failed to follow through on that element of the plan, the hearing officer found that there was no showing that its omission from the plan had any effect on the student's truancy or his behavior of marijuana possession. Thus, the hearing officer appeared to take a "no harm, no foul" view of the district's non-compliance in implementing the IEP.

b. ***Searcy Public Schools*, 30 IDELR 825 (SEA AR 1999).**

Unlike the hearing officer in *Poteet* above, the hearing officer in this case did not take the "no harm, no foul" approach to a district's procedural inadequacy. This case involved a 16-year old male student identified with a learning disability who, according to the parent, had previously been diagnosed as having attention deficit/hyperactivity disorder. The student arrived for basketball practice acting disoriented, and was subsequently determined to have been under the influence of alcohol while on school grounds. A manifestation determination was held where the Team considered the student's grades, school and disciplinary records, previous evaluations, the student's IEP and information from the parents, and concluded (over the parents' objection) that the misconduct was not a manifestation of the student's disability. As a result, the student was recommended for expulsion.

However, no regular education teachers attended the manifestation determination meeting, as is required under IDEA. The hearing officer found this procedural flaw significant, especially in light of the potential consequence of expulsion. As a result, the hearing officer overturned the manifestation determination as procedurally flawed, and ordered the IEP

Copyright © 2001 Drummond Woodsum & MacMahon. These materials may not be reproduced without prior written permission.

Team to conduct another manifestation determination with a properly constituted IEP Team.

c. ***Waynesboro Area School Dist.*, 34 IDELR 167 (SEA PA 2001).**

The school district in this case committed a major procedural flaw that doomed its manifestation determination from the outset: the district's special education director never convened an IEP Team meeting to discuss the relation between the student's conduct and her disability but instead, made the manifestation determination decisions herself. There was no parent involvement at all in the process. The hearing officer easily found in favor of the parents, and the appeals panel upheld all of the findings of the hearing officer, including the determination that the student's role in writing a bomb threat note was part of her "attention seeking behavior" that was a manifestation of her disability.

The hearing officer's findings regarding the student's understanding of the impact and consequences of her behavior is also notable. Despite the student's own admission that she knew she could "get fined and kicked out of school" for writing the note, the hearing officer found persuasive the parent's testimony that the student had difficulty understanding that if she did not actually commit an illegal act (writing the note), but rather was only part of the planning of that act (contributing suggestions to her friend who wrote the note), she still acted illegally or inappropriately. As a result, the hearing officer found that the student had difficulty understanding the consequences of her behavior when she believed she had not committed an illegal act when she participated in composing the note, and that this difficulty in understanding these moral differences was the result of her disability.

d. ***Hacienda La Puente Unified School Dist.*, 26 IDELR 666 (SEA CA 1997).**

The hearing officer overturned a school's determination that the student's involvement in a fight was not a manifestation of his disability. Although the 14-year old student was identified with a learning disability, he had a long history of attentional problems of which the school district was aware since first grade. In addition to finding that the student's conduct was caused by his disability, the hearing officer noted that the procedural aspects of the manifestation determination also had not been satisfied in the following respects: the IEP was inappropriate in relationship to the behavior because it did not address the student's behavioral and attentional difficulties and his increasing frustration in school, which he had

Copyright © 2001 Drummond Woodsum & MacMahon. These materials may not be reproduced without prior written permission.

experienced over a long period of time; and the student's placement at the time of the fighting incident was not appropriate.

e. ***Dallas School Dist.*, 28 IDLER 1225 (SEA OR 1998).**

A high school student with a specific learning disability was recommended for expulsion following his involvement in a fight on the last day of school. The panel reversed the school's finding of no manifestation because at the meeting, only the academic portions of the IEP were considered, instead of the entire IEP, which included behavioral portions. The fact that the Team did not consider whether the behavioral component of the IEP was appropriate in relation to the student's behavior was a fatal procedural flaw. The panel stated:

> It appears that the District did not consider the behavior portion of the IEP because D.I. was identified as a student with a learning disability. By including a behavior component in D.I.'s IEP, the IEP team acknowledged that D.I. had special education needs in this area. All of the areas of an IEP must be considered in making a manifestation [sic] [determination], regardless of a student's identified disability.

Understanding And Control: What Do These Terms Mean And When?

The substantive questions of a manifestation determination review are perhaps the most interesting, but also the most susceptible to different and conflicting interpretations. In general, where the misconduct at issue involves drugs or weapons, the school's determination that the behavior was not a manifestation of the student's disability has been upheld. This appears to be true even where the student's disability involves an emotional disturbance, behavioral problems, attention deficit disorder, or impulsivity.

1. Drug Cases:

a. ***Douglas County School Dist.*, 35 IDELR 108 (SEA CO 2001).**

A student with an emotional disability and long history of behavioral problems brought LSD to school disguised in a bottle of breath freshener, asked a classmate if he would like some breath freshener, and placed several drops of the liquid on the student's tongue. The drugged student began hallucinating and had to be taken to the hospital. The administrative

Copyright © 2001 Drummond Woodsum & MacMahon. These materials may not be reproduced without prior written permission.

law judge found that this conduct was not a manifestation of the student's disability. The nature of the conduct was a departure from the student's past behavior and therefore, the IEP properly did not address it. The student was highly intelligent and clearly understood the impact and consequences of his behavior, and the deviousness of the plan reflected premeditation and planning which suggested the student had control of his behavior.

b. ***Fairfax County Public Schools*, 34 IDELR 277 (SEA VA 2001).**

A 15-year old ninth grade student with a speech and language disability possessed and sold marijuana on school grounds. He was recommended for expulsion. The hearing officer upheld the school district's determination that the conduct was not a manifestation of the student's disability.

c. ***Hawkins County Board of Education*, 35 IDELR 23 (SEA TN 2001).**

A high school student identified as a student with a learning disability was caught with possession of a controlled substance and was expelled under the school's zero drug tolerance policy. The hearing officer upheld the school district's expulsion and its determination that the conduct was not a manifestation of the student's disability, even though student had some history of behavioral concerns in the past and the IEP addressed behavior and included a behavior plan.

d. ***Lodi School Dist.*, 33 IDELR 232 (SEA WI 2000).**

The administrative law judge concluded that the behavior of possessing marijuana, for which the student was expelled, was not a manifestation of the student's disability. Although the student had a learning disability and attention deficit disorder, the ALJ rejected the parents' argument that poor judgment was part of the student's learning disability and that he acted impulsively.

e. ***In Re: Student with a Disability*, 30 IDELR 113 (SEA CT 1999).**

The hearing officer in this case upheld the IEP Team's conclusion that the student's misconduct was not a manifestation of his disability where 17-year old student with an identified learning disability was found in possession of marijuana, a hashish pipe, cigarettes, and a container of tobacco dip. The student's disability had no impact on his judgment or his ability to regulate his behavior. The hearing officer rejected the parent's

Copyright © 2001 Drummond Woodsum & MacMahon. These materials may not be reproduced without prior written permission.

argument that the student's lack of self-esteem from his disability led to his association with other students involved with drugs.

f. ***Lakeland School Corp.*, 29 IDELR 1133 (SEA IN 1999).**

A 14-year old ninth grader with a specific learning disability was caught consuming alcohol on school grounds. The appeals panel upheld the determination that such conduct was not a manifestation of the student's disability.

g. ***Brown County School Corp.*, 31 IDELR 200 (SEA IN 1998).**

This appears to be the only reported administrative decision at the state level reversing a school district's finding that the student's possession of drugs on school property was not a manifestation of the student's disability. The facts of the case may reveal why the decision came down the way it did. The case involved a 17-year old male student with a history of cognitive deficits; although he was currently identified as learning disabled, he had previously been classified as mildly mentally retarded. The student was asked to hold a quantity of marijuana by a female student, who was attempting not to get caught herself. The student placed the marijuana in his wallet, and was sent to the principal's office where he freely disclosed the contents of his wallet. The student stated that he intended to tell his parents about the marijuana when he arrived home.

On these facts, the appeals panel reversed the manifestation determination by the school, which would have resulted in the student's expulsion from school. The panel offered the following cursory reasons for its decision: not all factors were duly considered in determining that the behavior was not a manifestation of the disability; the school was remiss in not addressing behavioral problems and not teaching "judgment skills" in the student's IEP; and the student's behavior was causally related to his disabilities. Reading between the lines, it appears the panel recognized that the student had been used as a pawn by a female student, who perhaps had chosen the student for his cognitive impairment and poor "judgment skills."

2. Weapons Cases:

a. ***Oconee County School System*, 27 IDELR 629 (SEA GA 1997).**

In this case involving a firearm, poor judgment was not a sufficient basis to overturn the school's determination that the misconduct was not a manifestation of the student's disability. The student in this case was

Copyright © 2001 Drummond Woodsum & MacMahon. These materials may not be reproduced without prior written permission.

classified as other health impaired because of his attention deficit hyperactivity disorder. The evidence at the hearing showed that as he was leaving home to go to school, the student discovered a shotgun in his vehicle which he had used to hunt with during the previous weekend. The student claimed that he considered removing the shotgun from his vehicle, but was afraid he would get in trouble with his parents. Once he got to school, the student again considered his situation and asked a friend if he thought it would be okay to leave the shotgun in his vehicle while it was parked on school property. The friend replied yes. The school became alerted to the gun, searched the student's vehicle, and turned the student over to law enforcement authorities. The student was suspended for 45 days. In reviewing the manifestation determination conducted by the IEP Team, the ALJ concluded that the student was not merely acting impulsively in a manner related to his ADHD, since the student considered the consequences of his actions at several points during the day. Nor was poor judgment an underlying symptom of ADHD, according to the ALJ. The district thus properly concluded that the firearm incident was not a manifestation of the student's disability.

b. ***Independent School District No. 279, Osseo Area Schools*, 30 IDELR 645, 33 IDELR 28 (SEA MN 1999).**

This case involved a 15-year old male student with an emotional disability who brought the components of a paintball gun (but not the CO_2 cartridge or paintballs) onto a school bus in a backpack, and gave it to its owner, having cleaned it at home. The student had a long history of emotional and behavioral difficulties, and had been diagnosed with ODD, ADHD, and bipolar affective disorder (provisional). The ALJ overturned the school's manifestation determination, finding that the student's behavior in bringing the paintball gun to school was a manifestation of his disability, which was characterized by impulsivity and failure to consider the consequences of his actions. Although the student agreed he could understand and follow school rules, and knew the difference between right and wrong, these were not the questions to be answered in a manifestation determination. The school improperly concluded that the student had simply made a bad choice in bringing the paintball gun onto the school bus. The ALJ also concluded that the paintball gun was not a "dangerous weapon" under IDEA since it was not used or readily capable of causing death or serious bodily injury. Thus, the school lacked the authority to unilaterally place the student in an interim alternative educational setting.

Copyright © 2001 Drummond Woodsum & MacMahon. These materials may not be reproduced without prior written permission.

3. Other Cases:

There are a number of other due process hearing decisions involving a challenge to a school's determination that particular misconduct was not a manifestation of the student's disability. In cases where the alleged misconduct did not involve drugs or weapons, but instead involved fighting, aggressive behavior, or threats of some kind, a majority of the cases come down in favor of the parents. There are some exceptions, however, and for these kinds of cases, the decisions sometimes turn on very specific facts. Several of these decisions, which go both ways, are summarized below.

For the parent:

a. ***Northeast Independent School Dist.*, 32 IDELR 51 (SEA TX 1999).**

A hearing officer struck down the school's finding of no manifestation where a 16-year old male student with an emotional disability was involved in an altercation with another student. The student was diagnosed with dysthymia, ADHD, ODD and depression. He had been previously disciplined for possession of marijuana and drug paraphernalia, and the manifestation determination found no link between his dysthymia and drug-related behavior. There was a battle of the experts at the hearing. The school's experts opined that the student's oppositional behavior stemmed from social maladjustment rather than his emotional disability. The parents' expert testified that the oppositional behavior was so intertwined with and fueled by his depression, anxiety, and ADHD that it was impossible to say that his misconduct was caused only by his oppositional defiance disorder and not a manifestation of his dysthymia. The hearing officer found the parents' expert more persuasive, concluding that the student's misconduct in the altercation with the other student could not be separated from his dysthymia, which impaired his ability to control his behavior.

b. ***Fort Smith Public Schools*, 29 IDELR 398 (SEA AR 1998).**

A hearing officer struck down the school's manifestation determination where a high school aged student with mental retardation engaged in inappropriate, sometimes violent behaviors in school. The school district did not consider all the characteristics that can be included in the disability category of mental retardation, including behavioral difficulties. Although the school argued that the student knew when his behaviors were

Copyright © 2001 Drummond Woodsum & MacMahon. These materials may not be reproduced without prior written permission.

inappropriate and was manipulative, the hearing officer found evidence to support that the student did not have the ability to control his inappropriate behaviors. In addition to mental retardation, the student had exhibited impulsive and distractible behaviors consistent with and ADHD diagnosis.

c. ***Hacienda La Puente Unified School Dist.,*** **26 IDELR 666 (SEA CA 1997).**

See 1(d) above. Hearing officer overturned school's manifestation determination where 14-year old student with long history of attentional and behavioral issues not addressed by IEP was involved in a fight with another student.

d. ***Dallas School Dist.,*** **28 IDLER 1225 (SEA OR 1998).**

See 1(e) above. School's determination that student's involvement in fight was not a manifestation of disability was overturned, since this learning disabled student had behavioral components in his IEP which were not considered by the IEP team and did not appear to be appropriate, in any event.

e. ***Laurens County School District #55,*** **31 IDELR 204 (SEA SC 1999).**

A 14-year old female student with ADD and mental retardation was expelled for being involved in a fight with another student. According to the evidence, the student had shown difficulty controlling her anger before but was not taking medication for ADD at the time of the incident. The hearing officer overturned the expulsion and the school's manifestation determination. The school had asked the wrong question of whether the student knew the difference between right and wrong. The hearing officer, referencing the "plethora of research" that has been published linking ADD and aggression, concluded that the student's ability to control her behavior once she became angry was significantly impaired. In addition, her below average cognitive ability would impair not only her ability to master academic material, but also her ability to "make judgments in everyday social situations."

f. **Klein *Independent School District,* 34 IDELR 140 (SEA TX 2000).**

An eighth grade student bit another student in an incident described as "playful." The conduct was determined not to be a manifestation of his disability, which included an emotional disability and other health impairment (based on the student's ADHD). There was evidence that the

Copyright © 2001 Drummond Woodsum & MacMahon. These materials may not be reproduced without prior written permission.

student had not taken his medication for ADHD on the morning of the incident. The hearing officer found that the school had applied improper and obsolete standards for a manifestation determination when it concluded that the student understood that biting was wrong. The student had acted impulsively in biting his classmate and thus the hearing officer ruled that his conduct was a manifestation of his disability.

g. ***Sequoia Union High School Dist.*, 34 IDELR 303 (SEA CA 2001).**

A 15-year old student was expelled for allegedly using a key to scratch a car owned by his principal. The student was on probation for past behavioral incidents, was identified as having a specific learning disability, and was reported to have an attention disorder. The hearing officer overturned the expulsion and the school's manifestation determination, finding that the student acted impulsively and used poor judgment as a result of his disability, which impaired his ability to control his behavior.

For the school:

h. ***Independent School Dist., Minn.*, 31 IDELR 44 (SEA MN 1999).**

A 16-year old student with an emotional disability was suspended for making a false bomb threat in the wake of the Columbine shootings. The hearing review officer reversed the decision of the hearing officer, finding that the hearing officer had impermissibly substituted her judgment for the findings and determinations of the IEP Team.

i. ***Oceanside Unified School Dist.*, 35 IDELR 27 (SEA CA 2001).**

The school was upheld in this case where a high school student with a specific learning disability smashed the windshield of another student's car with a trashcan. There was evidence that the student was motivated in his behavior by wanting to send a message to a rival gang member in response to a death threat. Although the student had experienced problems with controlling his anger in junior high school, there was no evidence of his inability to control his anger in high school. The hearing officer found the act was not a sudden outburst of anger, but a calculated response to a threat.

j. ***School District Five of Lexington/Richland Cty.*, 35 IDELR 55 (SEA SC 2001).**

A hearing review officer upheld the school's finding that the student's threatening behavior towards other students was not a manifestation of his

Copyright © 2001 Drummond Woodsum & MacMahon. These materials may not be reproduced without prior written permission.

disability. The student received services for a speech and hearing impairment. His parents were also hearing impaired. Although the student had been diagnosed with ADD, this condition did not appear serious enough to have an adverse effect on educational performance which would require additional special education and related services. The review officer found that the student's IEP and placement were both appropriate in relation to the behavior subject to discipline because there was an insufficient level of ADD present to indicate a need for additional services in the IEP. The evidence also supported that the student's ability to understand the impact and consequences of his behavior (he had signed a document indicating he had read and understood all school rules) and control his behavior (he exhibited good, focused behavior when doing a task he enjoyed) was not impaired by his disability.

Manifestation Determinations Under Section 504

The discipline rules under Section 504 of the Rehabilitation Act of 1973 are somewhat less stringent than under IDEA. For students identified only under Section 504, schools are permitted to suspend those students for 10 school days or less without calling prior 504 team meetings, without doing manifestation determinations, without doing evaluations, and without providing any alternative services. *Orangeburg County School District # 4*, 26 IDELR 1314 (OCR Apr. 28, 1997); OCR Staff Memorandum, 16 EHLR 491 (OCR Nov. 13, 1989). The discipline in question, however, must be consistent with the discipline that would be imposed on non-disabled students in similar circumstances.

Suspensions and expulsions of longer than 10 consecutive school days are considered a "significant change in placement" and would generally require a prior 504 Team meeting to determine if the misconduct at issue is related to the student's disability. *Id*; *see also S-1 v. Turlington*, 635 F.2d 342, 350 (5th Cir.), *cert. denied*, 454 U.S. 1030 (1981) (under Section 504 and the Education of the Handicapped Act, before a handicapped student can be expelled, a trained and knowledgeable group of persons must determine whether the student's misconduct bears a relationship to his handicapping condition). If the conduct is related, programming and further removal for the 504 student would have to be addressed through the 504 Team meeting process, draw upon evaluative data, and be calculated to address the student's educational needs. If the misconduct is not related to the disability, the school would be free to impose the same disciplinary consequences as are used for non-disabled students in similar circumstances, without any obligation to provide alternative services during the removal period. *Id.; see also Heumann Letter*, 22 IDELR 531, 537 (OSEP Apr. 26, 1995).

Copyright © 2001 Drummond Woodsum & MacMahon. These materials may not be reproduced without prior written permission.

Although 504 regulations do not contain explicit "manifestation determination" provisions such as the ones in IDEA, the same substantive elements of control and understanding would seem to be useful standards in determining whether particular misconduct by a Section 504 student is related to the student's disability. The Section 504 regulations do not, however, require schools to abide by the strict procedural requirements found in IDEA for conducting manifestation determinations, such as the requirements for prior notice and a meeting within 10 school days. *See DeKalb County (GA) School Dist.*, 32 IDELR 8 (1999) (school district not required under Section 504 to provide prior notice to parents of manifestation determination meeting).

Conclusion

Since the manifestation determination is critical to resolving special education discipline issues, the interpretation of this term will likely continue to be a hot spot in the development of special education law. As more of these cases reach our federal courts for review, one can only hope that some more consistent principles and trends will emerge.

Copyright © 2001 Drummond Woodsum & MacMahon. These materials may not be reproduced without prior written permission.

The Manifestation Determination: *A Checklist*

1. A manifestation determination IEP Team meeting must be held for any disciplinary removal of a special education student from school for more than 10 consecutive school days in a row; or for a series of removals totaling more than 10 cumulative school days, based on length, total time, and proximity of removals.

2. The manifestation determination must be made by the student=s IEP Team, not simply by school personnel.

3. At the Team meeting, the Team must undertake the following, as they relate to the behavior incident:

   A. Review the incident itself, all relevant test data and other information, and relevant observations of the student.

   B. Determine whether a functional behavior assessment of the child has been undertaken, and whether one may be needed in light of the incident in question.

   C. Review the current IEP, including any behavior plan that may exist, and the child=s placement.

4. The IEP Team should then answer the following questions:

   A. At the time of the incident, was the school failing to implement the IEP as it related to the behavior that is subject to disciplinary action?

   Yes No

   B. Was it obvious at the time of the incident that the IEP was inappropriate in relation to the behavior that is subject to disciplinary action?

   Yes No

   C. Did the student=s disability impair his or her ability to understand the impact and consequences of the behavior subject to disciplinary action?

   Yes No

   D. Did the student=s disability impair his or her ability to control the behavior subject to disciplinary action?

   Yes No

If the answer to any of these four questions is yes, then the behavior in question must be considered a manifestation of the student=s disability.

If the IEP Team determines that the misconduct is a manifestation of the student=s disability, the disciplinary incident must be dealt with through the normal special education procedures for determining programming and placement, and the student may not be suspended or expelled for the conduct in question.

If the Team determines that the misconduct is not a manifestation of the student=s disability, then the school may use the regular disciplinary procedures applicable to students without disabilities in the same

Copyright © 2001 Drummond Woodsum & MacMahon. These materials may not be reproduced without prior written permission.

manner as would be applied to children without disabilities, except that the student must continue to receive educational services during any suspension or expulsion that may be ordered.

Copyright © 2001 Drummond Woodsum & MacMahon. These materials may not be reproduced without prior written permission.

The Current Status of School Board
11th Amendment Immunity

Attainment of Eleventh Amendment immunity by school boards remains elusive, but perhaps the recent U.S. Supreme Court decisions in *Kimel v. Florida Board of Regents* [1]and *Board of Trustees of the University of Alabama v. Garrett* [2] give school boards cause to continue the quest. Although the chase may be like that of those who hunt the evasive Loch Ness Monster because they know it exists but haven't yet found it, school boards should continue to advance their cause for 11th Amendment immunity whenever the opportunity presents itself.

Kimel arises out of three ADEA cases, *Kimel, Dickson, and MacPherson*, which were consolidated by the 11th Circuit.[3] In McPherson, the District Court for the Northern District of Alabama held that the ADEA did not effectively abrogate a state's 11th Amendment immunity and dismissed the case. The District Court for the Northern District of Florida held that it did in *Kimel and Dickson*. The 11th Circuit concluded, in its consolidated opinion, that the ADEA effectively abrogated a state's 11th Amendment immunity. *Kimel* and *Dickson* were affirmed and *MacPherson* was reversed.

In its review of the 11th Circuit's decision in *Kimel*,[4] the Supreme Court addressed two issues: (1) whether Congress had the authority to abrogate a state's 11th Amendment immunity against suits by private individuals under the Commerce Clause of Article I of the U.S. Constitution and (2) if not, was the intended abrogation of 11th Amendment immunity valid under the remedial power of § 5 of the 14th Amendment.

Although the court concluded that Congress clearly intended to abrogate state 11th Amendment immunity in suits brought under ADEA and that the enactment of ADEA was a valid exercise of Congress' Commerce Clause authority; it reaffirmed its holding in *Seminole Tribe of Florida v. Florida* that Congress did not have the authority under the Commerce Clause to abrogate state 11th Amendment immunity.

The court next considered the legislative record underlying the enactment of ADEA in order to determine if the intended abrogation of 11th Amendment immunity could be upheld on the basis of the remedial authority of the 14th Amendment. Applying a two-part test of congruency and proportionality, the court concluded that the intended abrogation of 11th Amendment immunity was an invalid exercise of congressional authority. The court based its determination on an absence of evidence of widespread age discrimination in government in the legislative record underlying the enactment of the ADEA and a conclusion that the ADEA remedies were disproportionate to the problem Congress intended to remedy.

The court reversed the holding of the 11th Circuit Court of Appeal in the consolidated case; having concluded that Congress' intended ADEA abrogation of state 11th Amendment immunity was not a valid exercise of congressional authority under either the Commerce Clause of Article I or the remedial authority under § 5 of the 14th Amendment.

The Court came to the same conclusion in *Board of Trustees of the University of Alabama v. Garrett*,[5] a case involving Title I of the ADA, as it did in Kimel. Despite the attempt of Congress to apply Title I of the ADA to states, its effort failed the two-part test for constitutionality under § 5 of the 14th Amendment of congruency and proportionality. The Court found an absence of factual support for a conclusion of widespread discrimination against persons with disabilities in state government employment decisions in its examination of the legislative record underlying the enactment of the ADA For that reason, the court concluded that the remedy of Title I as applied to states was unconstitutionally disproportionate to the problem sought to be corrected.

Unfortunately, school boards, with perhaps one exception, do not enjoy the benefit of *Garrett*[6] or *Kimel.*[7] In a long line of decisions finding their genesis in *Mt. Healthy City School District v. Doyle,*[8]in which the Court wrote:

> The issue here thus turns on whether the Mt. Healthy Board of Education is to be treated as an arm of the State partaking of the State's Eleventh Amendment immunity, or is instead to be treated as a municipal corporation or other political subdivision to which the Eleventh Amendment does not extend. The answer depends, at least in part, upon the nature of the entity created by state law...Petitioner is but one of many local school boards within the State of Ohio. It is subject to some guidance from the State Board of

> Education...and receives a significant amount of money from the State. But local school boards have extensive powers to issue bonds, and to levy taxes within certain restrictions of state law. On balance, the record before us indicates that a local school board such as petitioner is more like a county or city than it is like an arm of the State. We therefore hold that it was not entitled to assert any Eleventh Amendment immunity from suit in the federal courts;[9]

Federal circuit courts have consistently held that school boards do not enjoy 11th Amendment immunity.[10] In each of the decisions holding against 11th Amendment abrogation, the courts have applied the four-part test set out in *Mt. Healthy.*[11] The four factors which the courts have examine are: (1) the characterization of the school district under state law; (2) the guidance and control exercised by the state over the local school board; (3) the degree of state funding received by the school district; and (4) the ability of the local board to issue bonds and levy taxes on its own behalf.

An example of an 11th Amendment analysis generally engaged in by the courts is found in *Cash v. Granville County Board of Education.*[12] The issue confronting the court in *Granville*[13] was whether the school board was entitled to be treated as an arm of the State of North Carolina and thus entitled to 11th Amendment immunity or whether the school board was more like a county or a municipal corporation[14]and, therefore, not entitled to 11th Amendment immunity.

In reaching its conclusion that the Granville Count School Board was not entitled to 11th Amendment immunity, the court considered the traditional four factors articulated in *Mt. Healthy.*[15] The first and most important factor considered is whether the treasury of the State of North Caroline is obligated to pay a money judgment rendered against the Granville County School Board. In that consideration the court noted that if the answer was yes, the inquiry need go no further. As the court, however, answered that question in the negative, it then considered the remaining three subsidiary factors:

> (1) the degree of control that the State exercises over the entity or the degree of autonomy from the State that the entity enjoys; (2) the scope of the

> entity's concerns--whether local or statewide-- with which the entity is involved; and (3) the manner in which State law treats the entity.[16]

The court concluded that because the Granville County School Board was locally elected and not appointed, could sue and be sued, retain private counsel without the consent of the state Attorney General, purchase and sell both real and personal property, enter into interlocal agreements with other units of government, build and maintain school buildings, sell and transfer school buildings for school purposes, and had the general responsibility for all matters pertaining to public schools within its jurisdiction it was an autonomous unit of government and, therefore, more like a city or a county.

The court determined that as the authority of the school board did not extend beyond the boundaries of Granville County, its authority local and like that of a county. Finally, the court concluded that the school board was not an arm of the state as school boards were excluded from the statutory definition of a state agency and that school boards had been defined as local entities by the state's own Supreme Court. For those reasons, the court held that a North Carolina School Board is not entitled to 11th Amendment immunity.

The one apparent exception to the majority rule is the 9th Circuit's treatment of California school boards. In *Belanger v. Madera Unified School District*[17] that court applied a five-factor analysis in to arrive at a contrary position to that of the other Circuits that have considered the issue. First, the court concluded that since the finances of local school districts are dictated by state law and state control, even to the degree of the revenue that school [18]districts may raise from local revenue, in fact the dollars used to satisfy any judgment against a school district would be, in the main, state dollars.

Second, the court determined that the state exercised broad control over public school decisions, such as which textbooks could be used and when students could be expelled or suspended. The court thereupon concluded that education in California is primarily a state function. Third, although the court found that California school districts may sue and be sued in their own name, such suits were subject to state waiver of sovereign immunity laws.

Fourth, the court noted that although school districts were permitted to own property in their own name, the beneficial ownership of such property was in the state. The court further noted that the aspect of property ownership was a very minor factor in the consideration of whether a California school district possessed 11th Amendment immunity.

Fifth the court noted that the California Supreme Court had characterized a district school board as an agency of state government.[19] Lucky California, but for how long.

Florida's profile. The Florida system of public education is becoming more and more a function of state control with each annual session of the Florida Legislature. The State Constitution, [20]state law,[21] and the directives of the State Legislature through budget proviso language control the financing of Florida's public schools. For example, the Legislature determines the value of one fully enrolled public school student.[22] The Legislature then determines the amount of state funds to be allocated towards that value, each district's required ad valorum tax levy contribution toward the value, and each district's maximum discretionary ad valorum tax levy. School Boards are then permitted to levy a limited ad valorum tax for prescribed capital outlay expenditures, the "two-mil levy." Although additional funds are appropriated by the Legislature, such as lottery money, districts are told how such money must be expended.

An example of a legislative directive is found in this year's mandate of an $850.00 bonus to be paid to each teacher having a satisfactory evaluation for the prior year. Although mandated by the Legislature, the bonus is payable out of a school district's state appropriation. The State of Florida now provides "McKay Special Education Scholarships" so that special education students may opt out of public education and enroll in state approved special education schools. The award of the scholarship is a function of the State Department of Education, however, the funding comes from of a school district's state special education appropriation. Construction of school facilities is subject to a common statewide building code. Previously to the enactment of the statewide building code, school districts were exempt from municipal and county building codes, but subject to a statewide code for educational facilities. State law determines the salaries of school board members and elected superintendents.

Although the issuance of charter school charters remains, for the moment, a function of district school boards, it is anticipated that the ultimate authority in the issuance and cancellation of a charter will shift from local school boards to the State Board of Education. That is when a school board declines to issue a charter or seeks to cancel a charter; the State Board of Education will have the final say.

More significantly, the Florida Constitution now mandates a seamless K-20 system of public education under the management of an appointed State Board of Education. What this means for what local control school boards still possess remains to be seen, but loss of additional local decision-making is anticipated.

Because of increasing state control, *Kimel*[23]and *Garrett*[24] give Florida school boards cause to continue the quest for 11th Amendment immunity. As educational governance and funding models change in Florida and perhaps across the nation, *Belanger*[25] may become the majority position.

---

[1] 528 US 356(2000)
[2] 531 US 356(2001)
[3] 139 F.3d 1426(11th Cir. 1998)
[4] Id.
[5] 531 US 356(2001)
[6] Id.
[7] 528 US 356(2000)
[8] 429 U.S. 274
[9] Id at 280-internal citations omitted
[10] See for example: *Narin v. Lower Merion School District*. 206 F.3d 323(3rd Cir. 2000); *Cash v. Granville County Board of Education*, 242 F.3d 219(4th Cir. 2001); *Duke v. Grady Municipal Schools*, 127 F.3d 972910th Cir. 1997); and *Mirabella v. School Board of Broward County*, Docket No. 97-06240-CV-ASO(11th Cir. 2001), (unpublished)
[11] 429 U.S. 274, at 280
[12] 242 F.3d 219,224(4th Cir. 2001)
[13] Id
[14] 429 U.S. 274, at 280
[15] Id.
[16] 242 F.3d 219,224(4th Cir. 2001)
[17] 963 F.2d 248(9th Cir. 1992) cert. denied 507 U.S. 919

[19] *Hall v.City of Taft, 47 Cal. 2d 177, 302 P.2d 574(1956)*
[20] § 1, Art. IX, Fla. Const.
[21] Chapter 236, Fla. Stat.
[22] State funding is provided through participation in the Florida Education Finance Plan, § 236.012 et seq.
[23] 528 US 356(2000)
[24] 531 US 356(2001)

---

[25] 963 F.2d 248

NSBA Council of School Attorneys'
2001 Advocacy Seminar

Current Issues in Employment Discrimination: Early Retirement Incentive Plans and the ADEA

"THE WISCONSIN EXPERIENCE"

Presented by Michael J. Julka

October 25-27, 2001

LATHROP & CLARK LLP

740 Regent Street
P.O. Box 1507
Madison, WI 53701-1507
(608) 257-7766
julka@lathropclark.com

"The Wisconsin Experience"

I. **The Beginning.**

A. The investigation of early retirement plans in Wisconsin school districts was precipitated by complaints filed against Minnesota school districts and the subsequent investigation of the early retirement plans in those districts.

B. Throughout the summer of 2000, Wisconsin school districts began receiving formal communications from the EEOC that it was conducting an investigation regarding the legality of early retirement plans in the districts under the ADEA. The EEOC investigation was initiated in each district with a compliance questionnaire. *See Attachment 1.* The compliance questionnaire requested the following information from each district:

1. Whether the school district had maintained any collective bargaining agreement or side letter of understanding that addressed early retirement incentive pay or benefits, early retirement incentive health and/or dental benefits, or severance pay or benefits. If such an agreement existed, a copy of the collective bargaining agreement or side letter was to be supplied to the EEOC.

2. If reference was made to age in the early retirement provision, the school district was to explain why such a plan or policy was adopted and maintained, including whether there was a cost justification or other rationale for the plan. The school district was to explain who, by name, affiliation, and telephone number, had been responsible for proposing, adopting, and maintaining such agreements or understandings; and the school district was to list all employees who had retired since July 1, 1998, including the retiree's name, position, date of retirement, age at retirement, years of service, whether the individual was eligible for early retirement incentive or severance pay and/or benefits, and the amount of each benefit received by each such person.

II. **Notice of Charge of Discrimination.** During and following the investigation period, most, but not all, of the school districts that had been required to submit collective bargaining agreements for review by the EEOC received a notice of charge of discrimination. *See Attachment 2.* Early communications with the EEOC suggested that EEOC investigators had merely made cursory reviews of the collective bargaining agreements provided them and the early retirement plans contained within them. In fact, the EEOC acknowledged that it had not made a final decision on the charges at the time the notices were issued and that further evaluation would need to be done with regard to each early retirement plan. Further, the EEOC acknowledged that many of the charges could have been issued in error.

III. **"Violators."** To those school districts utilizing plans that were ultimately determined to be in violation of the ADEA, the EEOC sent letters of determination. *See Attachment 3.* These letters specified the nature of the violation as well as the remedial action that the

EEOC expected would be taken to address the violation. More specifically, the letters of determination served as notice that the EEOC was prepared to begin conciliation with the school districts with regard to the retirement plans.

> ***Example One:*** *The following retirement incentive plan did not warrant a finding of discrimination under the ADEA:*
>
> *Teachers who retire early under this provision shall be eligible to remain in the group insurance coverages maintained by the District. The District shall pay the monthly insurance premiums at a rate fixed as the board's contribution for health insurance in the year following the teacher's retirement...according to the following schedule: one year of insurance coverage for 10 years of service; two years of insurance coverage for 15 years of service; three years of insurance coverage for 20 years of service; four years of insurance coverage for 25 years of service; and five years of insurance coverage for 30 years of service.*
>
> ***Example Two:*** *The following retirement incentive plan did warrant a finding of discrimination under the ADEA:*
>
> *The School Board will offer to provide health insurance to all early retirees for a period equal to the number of years he/she elects early retirement before the age of 65, up to a maximum of five years. The School Board will pay up to a sum of $40,000 to purchase health insurance under the district's current health insurance plan. The sum of up to $40,000 will be held by the district and used to purchase single or family health insurance for the retiree until it is exhausted or until the retiree has received five (5) years of benefits or until age 65, whichever comes first. Retirees may choose to receive up to $10,000 of the $40,000 in cash payments of no more the $2,000 per year for a maximum of five (5) years or until age 65, whichever comes first.*

IV. **Conciliation.** Two conciliation agreements were proposed to districts by the EEOC.

A. **Number One.** The initial proposed conciliation agreements contained four main elements. *See Attachment 4.*

1. School districts were to pay to all persons who were eligible for the early retirement benefits double the amount of money lost as a result of the plan capping early retirement benefits when the retiree became age 65 or eligible for Medicare, plus interest.

2. School districts were to eliminate any retiree health benefits that were granted on the basis of age.

3. School districts were to sign and conspicuously post a notice of the agreement to the employees on bulletin boards for a period of 3 months from the date of the execution of the conciliatory agreement.

4. School districts were to cease discriminating on the basis of age in all phases of employment.

B. **Number Two.** In the early months of 2001, the EEOC issued new conciliation agreements to school districts. These new proposed conciliation agreements required school districts to take two steps. *See Attachment 5.*

1. School districts were to negotiate with unions to revise language in their collective bargaining agreements concerning early retirement incentive benefits to bring them into compliance with the ADEA. The school districts were to forward a signed copy of the revised collective bargaining agreement to the EEOC within 10 days after the agreement had been entered into.

2. During the period between the effective date of the conciliation agreement and the implementation of a new collective bargaining agreement, school districts were to offer all eligible employees early retirement benefits that are the same in all respects (including, but not limited to, amount, rate, plan coverage, and payment options) as those offered to employees who retire at the earliest allowable early retirement age under the existing collective bargaining agreement.

C. Troubling Aspects of the Proposed Conciliation Agreements.

1. The EEOC believed that it made no difference whether the assurance of change to retirement plans came from a school district unilaterally, or from a school district and a union, jointly. Therefore, the EEOC did not initially charge employee unions with discrimination or make them subject to the proposed conciliation agreements.

   In initially failing to require that unions be party to the proposed conciliation agreements, the EEOC ensured that the acceptance of the initial proposed conciliation agreement by a school district would effectively place a school district in an inferior future bargaining position. Acceptance of the proposed conciliation agreement would have forced a school district to change the early retirement benefits offered to union members. Thus, when back at the bargaining table, a school district would have had to make additional concessions in exchange for either the union's approval of the mandated changes or in exchange for an early retirement plan that would achieve cost-savings for the district.

2. If a school district were to accept the proposed conciliation agreement and then implement changes to retirement plans, the school district would, in unilaterally changing benefits for those employees who retire before a new collective bargaining agreement is reached, violate the existing collective bargaining

agreement between the school district and the union. School districts could then face employee grievances and prohibited practice charges under state statute.

Furthermore, under Wisconsin law, the school district could not make a qualified economic offer during contract negotiations for a successor collective bargaining agreement because a fringe benefit provided by the current contract, and in effect on the 90th day prior to contract expiration, would have been modified. This would subject the school district to lengthy and costly interest arbitration.

3. The proposed conciliation agreements provided no protection for the school districts against lawsuits by individual employees and retirees. Further, the courts may have viewed the agreements as an admission of guilt if individuals brought such lawsuits. School districts signing those agreements would thereby be made more vulnerable in such litigation.

D. Advice Given in Response to the Second Proposed Conciliation Agreement.

1. School districts were advised to calculate the cost associated with satisfying the EEOC's proposal (requiring that the district pay all retirees the maximum benefit available under their early retirement plans). The determination of these costs was calculated by considering all of the retirees that had or would reach the age/Medicare-based cap under a school districts' early retirement plan in the previous 2 year period, *i.e.,* the same employees originally identified in response to the EEOC's first questionnaire, plus this year's retirees.

2. School districts were advised to determine when current plan beneficiaries would reach the age/Medicare-based cap provided for in a plan. The speed with which beneficiaries reached the cap would influence how quickly a district needed to address the EEOC's proposal and/or take additional steps to protect the district's interests.

3. The EEOC's proposed conciliation agreements presumed that the health insurance carrier providing coverage to a school district would allow individual retirees to continue to participate in a regular health insurance plan after they reach age 65 and/or are eligible for Medicare benefits. This is not necessarily the case. Accordingly, school districts were advised to immediately secure written confirmation from their health insurance carriers as to whether their carrier would allow non-employees who have reached age 65 and/or are Medicare eligible to continue to participate in the regular health insurance plan as part of an early retirement benefit.

E. The Use of Individual Retiree Waivers

As a result of the EEOC's efforts, many school districts in Wisconsin elected to bargain with employee unions in an attempt to change successor collective bargaining agreement language related to early retirement. This course of action was often pursued as it was the most conservative way to ensure that the district would not be liable to prospective retirees. But what of those retirees already receiving benefits under a plan that had been deemed in violation of the ADEA by the EEOC?

Many districts opted to have those retirees, and representatives of the unions that represented them, execute a "Resignation Agreement and General Release" (Agreement) related to their early retirement benefits. Some such Agreements simply stated that the retiree would receive the retirement benefits provided for in the collective bargaining agreement in existence at the time of their retirement. Other, more conservative districts utilized a waiver that provided that the retiree would receive the maximum benefit available under the early retirement provision, regardless of their age at the time of retirement.

Two things were consistent among all of these Agreements: (1) the union agreed not to sue the district, on behalf of any individual retiree, based on the amount of retirement benefits received by that retiree and not to allege that the district individually bargained with the retiree about retirement benefits, in contravention to state statute, and (2) the employee agreed that the amount of retirement benefits to be received or being received under the Agreement was the total amount of retirement benefit to be received and further, each retiree waived his/her right, as an individual, to bring a suit against the district in the future based on a violation of their rights under the ADEA and the retirement benefits they received. *See Attachment 6.*

Several variations of this Agreement were drafted and ultimately executed by individual retirees, employee unions, and district representatives. Few individual retirees already receiving retirement benefits refused to execute such waivers. At this time, no individual retiree has challenged the execution of such a waiver.

V. **The EEOC Modifies Its Position – Is the End Near?** Late last year and early this year, the EEOC began notifying numerous Wisconsin school districts that they were no longer under investigation for age discrimination and that the EEOC would no longer be seeking conciliation agreements with regard to their early retirement plans. *See Attachment 7.* Further, in July of 2001, school districts began receiving notice from the EEOC that insurance-based incentives that are part of an early retirement plan for employees would not be pursued for conciliation or lawsuit purposes, even if those benefits were reduced or eliminated on the basis of age.

> *Note: During the summer of 2001, the EEOC began sending conciliation notices to unions. These conciliation agreements are the same as the second agreement received by the school districts. However, these offers clearly state that the EEOC will not seek a charge against early retirement incentive plans that offer extended health care coverage to retirees (generally in the form of a Medicare bridge), but will pursue a charge in relation to cash-based early retirement incentives. This reflects the EEOC's changed position with regard to insurance-based benefits. See Attachment 8.*

However, some districts were notified by the EEOC that, while the EEOC would not seek conciliation related to insurance-based incentives, it intended to continue to seek conciliation for cash-based incentives contained in the district's retirement plan that are reduced or eliminated because of age. *See Attachment 9.*

> ***Example:*** *The following is an example of the type of insurance-based incentives that are no longer of concern to the EEOC:*
>
> *A qualified early retirement teacher will be eligible to be included in the school district's current health insurance program subject to the rules and regulations of the carrier. For eligible retired teachers the district will contribute toward the health insurance premium at the rate of one year of health insurance coverage for fifteen years of service, two years of health insurance coverage for seventeen and one-half years of service, three years of health insurance coverage...All payments and insurance coverage under this Article shall terminate upon the completion of the period listed above or upon the retiree's eligibility for Medicare/Medicaid, whichever comes first.*
>
> ***Example:*** *The following is an example of the type of cash-based incentive that the EEOC continues to pursue:*
>
> *District teachers...having reached the age of 55...in the year in which they terminate employment with the District for reasons other than non-renewal or discharge shall receive a sum of $7,500 per year for a maximum of three years or until eligible for Medicare/Medicaid, or until death, whichever occurs first.*

Currently, of the 300 cases filed by the EEOC against Wisconsin school districts, 37 have been dismissed while another 150 cases related exclusively to insurance benefits have also been dropped. The approximately 100 cases remaining open include districts that provide both health insurance and/or some form of cash benefit to retirees that are capped at age 65 or Medicare eligibility. Of these, the EEOC has dismissed the charges related to the health benefits, leaving only the charges related to cash payouts.

VI. Legislative Actions.

A. Beginning early in the fall of 2000, state education associations such as the Wisconsin Education Association Council and the Wisconsin Association of School Boards began pursuing alternative means by which to resolve this matter. The most important and promising avenue explored was that of legislative change.

B. By the end of 2000, a group called the Alliance to Save ERIPs was formed. The membership of this group consisted of school districts throughout the state of Wisconsin and statewide associations. The group was formed to work with the members of the Wisconsin congressional delegation and leadership of the U.S.

Congress in an effort to amend the ADEA to preserve the ability of school boards and employees to maintain meaningful, voluntary ERIPs, to avoid or limit the costs and potential liability of litigation, and to slow or halt the EEOC's enforcement initiative. The attempt to remedy the problem by way of legislative change was largely driven by the success of colleges and universities in amending the ADEA to allow for age-based early retirement benefits in higher education institutions.

C. While earlier attempts to remedy the situation by way of legislative change have failed, the most recent legislation introduced by Congressmen Petri and Kind of Wisconsin, known as the "Teacher Voluntary Early Retirement Incentive Act of 2001," is promising legislation to amend the ADEA. This legislation was co-sponsored by every Wisconsin member of the House delegation except Dave Obey and was also co-sponsored by Minnesota Congressmen Colin Peterson and Gil Gutknecht. *See Attachment 10.*

D. The "Teacher Voluntary Early Retirement Incentive Act of 2001" generally provides that:

1. The ADEA will not be violated solely because a voluntary early retirement incentive plan maintained by a local educational agency provides for supplemental benefits to an employee that are reduced or eliminated on the basis of the employee's age at the time of the employee's retirement, if:

   a. The employer does not implement any other prohibited age-based reductions in or elimination of benefits;

   b. The supplemental benefits are in addition to any retirement or severance benefits which have been offered generally to employees, independent of any early retirement incentive plan, within the preceding 365 days; and

   c. With respect to any supplemental benefits for which an employee first becomes eligible after the enactment of "Teacher Voluntary Early Retirement Incentive Act of 2001":

      (1) Any employee who attains the minimum age and satisfies all non-age based conditions for receiving a benefit under the plan has at least 180 days to make a decision on retirement; and

      (2) Any employee who is not eligible to receive the maximum supplemental benefits provided under the plan because of the age of such employee at the time of retirement was afforded a reasonable opportunity to receive such maximum benefits at a previous time in such employee's employment.

184

2. It shall not be a violation of the ADEA if an employee benefit plan provides for medical benefits for retired participants that are altered, reduced, or eliminated when the participant is eligible for Medicare.

nasb.advocacy seminar.2001.doc

Attachment 1

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Milwaukee District Office

310 West Wisconsin Avenue, Suite 800
Milwaukee, WI 53203-2292
(414) 297-1111
TTY (414) 297-1115
FAX (414) 297-4133 & 3146

July 26, 2000

Dear Sir/Madam:

This is to inform you that the Equal Employment Opportunity Commission is reviewing the compliance status of your organization under the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 626 et. seq. (ADEA). Specifically, we are interested in severance, retirement incentive pay, retirement incentive health/dental insurance and related benefits offered to your employees. The attached Request for Information seeks preliminary information necessary for the Commission to discharge its statutory responsibility and to determine if any violations of the ADEA have occurred. Please submit the requested information before **August 9, 2000**. The ADEA provides the EEOC with broad enforcement and investigative powers. This authority is restated at 29 C.F.R. § 1626.4 and 1626.15(a).

Section 1626.4 provides, in relevant part:

> "The Commission may, on its own initiative, conduct investigations of employers, employment agencies and labor organizations, in accordance with the powers vested in it pursuant to Sections 6 and 7 of the Act."

Section 1626.15(a) provides as follows:

> "As provided in Sections 9, 11, 16 and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 209, 211, and 216 and 217) (FLSA) and Sections 6 and 7 of this Act (ADEA), the Commission and its authorized representatives may (1) investigate and gather data; (2) enter and inspect establishments and records and make transcripts thereof; (3) interview employees; (4) impose on persons subject to the Act appropriate record keeping and reporting requirements; (5) advise employers, employment agencies and labor organizations with regard to their obligations under the Act and any changes necessary in their policies, practices and procedures to assure compliance with the Act; (6) subpoena witnesses and require the production of documents and other evidence; (7) supervise the payments of amounts owing pursuant to section 16(c) of the FLSA, and (8) institute action under section 16(c) or section 17 of the FLSA, or both, to obtain appropriate relief."

Your anticipated cooperation is appreciated and we look forward to receiving the requested information before **August 9, 2000**. Your prompt response will enable us to expedite our compliance review and disposition of this matter. All questions or inquiries should be directed to me at 414-297-4056.

Sincerely,

Pamela A. Bloomer

Pamela Bloomer, Investigator
Milwaukee District Office

COMPLIANCE QUESTIONNAIRE

The information described and requested by this questionnaire is necessary for the United States Equal Employment Opportunity Commission to review your organization's compliance status under the ADEA.

Please supply the information specified to the Milwaukee District Office before the date indicated on the attached letter. If there are any questions, please contact Pamela Bloomer at telephone number (414) 297-4056. Your information may be faxed to Ms. Bloomer at 414-297-4133.

We appreciate your cooperation in supplying the following:

1. If the name, superintendent or chief executive officer, or address of the school district is different than provided on the attached letter, please provide the correct information.

2. Identify the union(s) with which the school district has any collective bargaining agreements.

3. Since July 1,1998, has the school district maintained any collective bargaining agreements, or side letters of understanding, that relate to early retirement incentive pay or benefits, early retirement incentive health/dental benefits, or severance pay or benefits? If so, provide a copy of each such agreement or side letter of understanding.

4. If any of the bargaining agreements or side letters of understanding referenced in Item 3, above, make reference to age:

A. explain why such plan or policy was adopted and maintained. In addition, state whether there is a cost justification or other rationale asserted for the plan or policy;

B. explain who (by name, affiliation, and telephone number) has been responsible for proposing, adopting, and maintaining such agreements or understandings; and

C. list all employees who have retired since July 1, 1998, and include their name, position, date of retirement, age at retirement, years of service, whether the individual was eligible for early retirement incentive or severance pay and/or benefits, and the amount of each benefit received by each such person.

Please be advised that, in any matter within the jurisdiction of a federal agency, anyone who wilfully falsifies, conceals, or covers up a material fact; makes any false, fictitious, or fraudulent statements; submits a false document; or submits false, fictitious, or fraudulent statements is subject to a fine of up to $10,000 and/or imprisonment of up to five years. (18 U.S.C., Section 1001.)

Attachment 2

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

PERSON FILING CHARGE
E E O C, Milw. Dist. Ofc

THIS PERSON (check one)
☐ CLAIMS TO BE AGGRIEVED
☒ IS FILING ON BEHALF OF ANOTHER

DATE OF ALLEGED VIOLATION

Earliest	Most Recent
09/09/1999	06/28/2000

PLACE OF ALLEGED VIOLATION

CHARGE NUMBER
260A00855

NOTICE OF CHARGE OF DISCRIMINATION

(See EEOC "Rules and Regulations" before completing this Form)

You are hereby notified that a charge of employment discrimination has been filed against your organization under:

☐ TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

☒ THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967

☐ THE AMERICANS WITH DISABILITIES ACT

☐ THE EQUAL PAY ACT (29 U.S.C, SECT. 206(d)) investigation will be conducted concurrently with our investigation of this charge.

The boxes checked below apply to your organization:

1. ☐ No action is required on your part at this time.
2. ☒ Please submit by 07/14/00 a statement of your position with respect to the allegation(s) contained in this charge, with copies of any supporting documentation. This material will be made a part of the file and will be considered at the time that we investigate this charge. Your prompt response to this request will make it easier to conduct and conclude our investigation of this charge.
3. ☐ Please respond fully by __________ to the attached request for information which pertains to the allegations contained in this charge. Such information will be made a part of the file and will be considered by the Commission during the course of its investigation of the charge.

For further inquiry on this matter, please use the charge number shown above. Your position statement, your response to our request for information, or any inquiry you may have should be directed to:

EEOC
310 W. Wisconsin Avenue, Suite 800
Milwaukee, WI 53203-2292

Frances H. Assa, Supervisor
(Commission Representative)

(414) 297-1865
(Telephone Number)

3371, mark

☒ Enclosure: Copy of Charge

BASIS OF DISCRIMINATION

☐ RACE ☐ COLOR ☐ SEX ☐ RELIGION ☐ NAT. ORIGIN ☒ AGE ☐ DISABILITY ☐ RETALIATION ☐ OTHER

CIRCUMSTANCES OF ALLEGED VIOLATION

See enclosed Charge of Discrimination.

DATE	TYPED NAME/TITLE OF AUTHORIZED EEOC OFFICIAL	SIGNATURE
06/29/2000	Chester V. Bailey	Chester V. Bailey

EEOC FORM 131 (Rev. 06/92)

RESPONDENT'S COPY

Attachment 3

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Milwaukee District Office
310 West Wisconsin Ave., Suite 800
Milwaukee, WI 53203-2292
PH: (414) 297-1111
TDD: (414) 297-1115
FAX: (414) 297-4133/3146

Charge Number: 260-A1-0207

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
310 West Wisconsin Avenue, #800
Milwaukee, WI 53203

vs.

Respondent

DETERMINATION

I issue the following determination on the merits of this charge. The Respondent is an employer subject to the Age Discrimination in Employment Act of 1967, as amended (ADEA), 29 U.S.C. Section 621, et seq. All requirements for coverage have been met. I have considered all the evidence disclosed during the investigation and find that there is reasonable cause to believe that there is a violation of the Age Discrimination in Employment Act of 1967, as amended.

> The evidence shows that the Respondent has maintained a facially discriminatory policy which reduces the retirement benefits available to older employees based upon their age. The Respondent has not demonstrated a valid cost justification directly related to the age of older workers who receive reduced benefits. In addition, the Respondent has not demonstrated that inducing older workers to retire by reducing their benefits is consistent with the purposes of the ADEA. The Respondent's policy has adversely affected all persons age 58 and over who have received, or will receive, reduced benefits based upon their age. For example, in the Collective Bargaining Agreement (CBA) with the Educational Association, Under Article XIII, Section L, July 1, 1999-June 30, 2003, the Respondent's use of a sliding scale which reduces the period of time that a retiree is eligible for monthly benefits based on age and the termination of monthly benefits altogether of retirees who become Medicare/ Social Security eligible, is a violation of the ADEA. Similar violations are found in the July 1, 1997-June 30, 1999, CBA with the Association, under Article XIII, Section L.

Section 7(b) of the ADEA requires that before instituting any legal action, the Commission shall attempt to eliminate the discriminatory policies or practices alleged, and to obtain voluntary compliance with the requirements of the Act through informal methods of conciliation, conference, and persuasion. This Letter of Determination serves as notice that EEOC is prepared to begin conciliation in accordance with Section 7(b).

Disclosure of information obtained by the Commission during the conciliation process will be made in accordance with Section 1601.26 of the Commission's Procedural Regulations. It is Commission policy to notify each aggrieved person of the right to sue for remedial relief, including recovery of back pay, an equal amount in liquidated damages, plus attorney's fees and court costs. **However, we will withhold notice to aggrieved persons for at least ten (10) days from the date of this letter in order to provide Respondent with an opportunity to discuss this matter further.**

If the Respondent declines to discuss settlement, or if for any other reason the Commission's representative is unable to secure an acceptable settlement, the Director will inform the parties in writing and advise them of the court enforcement alternatives available to aggrieved persons and the Commission.

On behalf of the Commission:

Monty M. Johnson
Monty M. Johnson
Acting District Director

DEC 0 6 2000
Date

cc: Heidi S. Tepp
Lathrop & Clark
740 Regent Street, Suite 400
P.O. Box 1507
Madison, WI 53701-1507

Attachment 4

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Milwaukee District Office

310 West Wisconsin Ave., Suite 800
Milwaukee, WI 53203-2292
PH: (414) 297-1111
TDD: (414) 297-1115
FAX: (414) 297-4133/3146

CONCILIATION AGREEMENT

In the Matter of:

U. S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
310 West Wisconsin Avenue, Suite 800
Milwaukee, WI 53203

vs.

Respondent

Charge Number: 260-A0-0905

*****

An investigation having been made under the Age Discrimination in Employment Act of 1967, as amended (ADEA) by the U.S. Equal Employment Opportunity Commission (EEOC) and reasonable cause having been found, the parties do resolve and conciliate this matter as follows:

GENERAL PROVISIONS

1. The EEOC agrees not to sue the Respondent with respect to any allegations contained in the above-captioned charge. The EEOC agrees not to use the above-captioned charge as the jurisdictional basis for filing a lawsuit against the Respondent. However, nothing in this Agreement shall be construed to preclude the EEOC and/or any aggrieved individual(s) from bringing suit to enforce this Agreement in the event that the Respondent fails to perform the promises and representations contained herein, nor shall anything in this Agreement precludes the EEOC from filing charges against the Respondent in the future. The EEOC shall determine whether the Respondent has complied with the terms of this Agreement.

2. The EEOC reserves all rights to proceed with respect to matters like and related to these matters but not covered in this Agreement and to secure relief on behalf of aggrieved persons not covered by the terms of this Agreement.

3. The Respondent agrees that it shall comply with all requirements of Title VII of the Civil Rights Act of 1964, as amended; the Americans with Disabilities Act of 1990; the Age Discrimination in Employment Act of 1967, as amended; and the Equal Pay Act of 1963, as amended.

4. The parties agree that there shall be no discrimination or retaliation of any kind against any person because of opposition to any practice declared unlawful under any statute administered by the EEOC or because of the filing of a charge, giving of testimony, or assistance or participation in any manner in any investigation, proceeding, or hearing under any statute administered by the EEOC.

5. The Respondent agrees that the EEOC may review compliance with this Agreement. As a part of such review, the EEOC may require written reports concerning compliance, inspect Respondent's premises, interview witnesses, and examine and copy relevant documents.

6. The parties agree that the rights of all unlocated persons entitled to specific relief as provided for under the terms of this Agreement are preserved.

EMPLOYMENT POLICIES AND PRACTICES

The Respondent agrees to cease discriminating on the basis of age in all phases of employment including recruitment, hiring, job assignment, promotion, training, accommodation and other terms, conditions, or privileges of employment.

RELIEF

The Respondent agrees to pay all persons who were eligible for the early retirement benefit double the amount of money lost as a result of the policy cutting off early retirement benefits when the retiree becomes 65 years of age and/or eligible for Medicare, plus interest. This shall include any employees affected within a two-year time period prior to the date the charge was filed.

In addition, the Respondent agrees to end the policy which eliminates retiree health benefits on the basis of age.

NOTICE REQUIREMENT

The Respondent agrees to sign and conspicuously post the "Notice to Employees" found at Attachment A to this Agreement. The Respondent will post copies of the Notice on all employee bulletin boards for a period of three months from the date of execution of this Agreement.

CONSENT FOR RELEASE OF NOTICE

In view of the voluntary undertaking on the part of all parties concerned, it is agreed that the terms of this Agreement shall be disclosed to the public, with the understanding that the contents of conciliation discussions between the parties hereto be excluded and considered and treated as confidential.

SIGNATURES

I have read the foregoing Conciliation Agreement and I accept and agree to the provisions contained therein:

Date

Superintendent
for Respondent

Approved on behalf of the Commission,

Date

Chester V. Bailey
District Director

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Milwaukee District Office
310 West Wisconsin Ave., Suite 800
Milwaukee, WI 53203-2292
PH: (414) 297-1111
TDD: (414) 297-1115
FAX: (414) 297-4133/3146

ATTACHMENT A

NOTICE TO ALL EMPLOYEES

This notice is being posted pursuant to a conciliation agreement between the Prescott Public School District and the Equal Employment Opportunity Commission (EEOC).

Federal law requires that there be no discrimination against any employee or applicant for employment because of the individual's race, color, religion, sex, national origin, age (40 and over) or disability, with respect to hiring, promotion, firing, compensation, accommodation or other terms, conditions or privileges of employment. Federal law also prohibits retaliation against any employee who files a charge of discrimination, or who cooperates with the government's investigation of a charge.

The Prescott Public School District supports and will comply with such federal law in all respects and will not take any action against employees because they have exercised their rights under the law.

The Prescott Public School District has an equal employment opportunity policy and will ensure that all supervisory employees and other employees abide by the requirements of that policy and that employees will not be discriminated against on the basis of their age.

Signed this _______ day of ____________, ______.

____
Superintendent

THIS NOTICE MAY NOT BE REMOVED BEFORE _____________

Attachment 5

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Milwaukee District Office 310 West Wisconsin Ave., Suite 800
Milwaukee, WI 53203-2292
PH: (414) 297-1111
TDD: (414) 297-1115
FAX: (414) 297-4133/3146

RECEIVED APR 3 0 2001

April 27, 2001

EEOC
vs

Dear Sir or Madam:

The U.S. Equal Employment Opportunity Commission (Commission), Milwaukee District Office, previously initiated the charge of discrimination cited above alleging that the provisions of one or more of your collective bargaining agreements relating to early retirement incentive benefits violate the Age Discrimination in Employment Act (ADEA). In the interest of resolving this charge expediently and without further expense, we propose that the parties enter into a conciliation agreement that contains the following terms:

1. The school district will negotiate with its unions to revise language in their collective bargaining agreements concerning early retirement incentive benefits to bring them into compliance with the ADEA. The school district will forward a signed copy of the revised collective bargaining agreement to the EEOC's Milwaukee District Office within 10 days after the agreement has been entered into.

2. During the period between the effective date of the conciliation agreement and the implementation of a new collective bargaining agreement, school districts will offer all eligible employees early retirement incentive benefits that are the same in all respects (including, but not limited to, amount, rate, plan coverage, and payment options) as those offered employees who retire at the earliest allowable early retirement age under the existing collective bargaining agreement.

3. In consideration for the school district's satisfactory performance of the above, EEOC will terminate its investigation of the directed charge against the school district.

I should stress that this agreement applies only to the ADEA *directed* charge initiated by the Milwaukee District Office and will not resolve of any *individual* ADEA charge currently pending or that may be filed in the future.

We have enclosed a draft agreement containing the terms discussed above. If you are amenable to resolving this charge under these terms, please sign and return the agreement. If you have any questions about the draft agreement, please contact either Nancy Sienko at 414-297-1294 or Ruth Wagner at 414-297-1290.

To assist your efforts to draft early retirement incentive plans that are ADEA compliant, we have attached a fact sheet that discusses examples of several types early retirement incentives that the Commission finds acceptable.

Sincerely,

Monty M. Johnson

for Chester V. Bailey
District Director

Attachments

CONCILIATION AGREEMENT

1. This Agreement refers to Directed Charge No. 260A10207, a charge initiated by the U.S. Equal Employment Opportunity Commission (EEOC) pursuant to the Age Discrimination in Employment Act (ADEA).

2. In exchange for the EEOC's promises contained in paragraph 3 below, Respondent agrees to:

   A. revise language in their collective bargaining agreements concerning early retirement incentive benefits to bring them into compliance with the ADEA;

   B. during the period between the effective date of this Agreement and the implementation of a new, ADEA-compliant collective bargaining agreement, offer all eligible employees early retirement incentive benefits that are the same in all respects (including, but not limited to, amount, rate, plan coverage, and payment options) as those offered employees who retire at the earliest allowable early retirement age under the existing collective bargaining agreement; and

   C. forward a signed copy of the revised collective bargaining agreement identified in Section 2.A., above, to EEOC's Milwaukee District office at the address below within 10 days after the collective bargaining agreement is signed by all parties:

      Chester V. Bailey, District Director
      Milwaukee District Office
      Equal Employment Opportunity Commission
      310 West Wisconsin Avenue, Suite 800
      Milwaukee, Wisconsin 53203

3. In consideration for the promises made in paragraph 2, above, EEOC agrees to terminate its investigation of Directed Charge No. 260A10207 and not to use this Directed Charge as the jurisdictional basis for a civil action under the ADEA. By entering into this agreement, EEOC does not waive or in any manner limit its right to process or seek relief in any other charge or investigation.

4. This Agreement may be specifically enforced in court and may be used as evidence in a subsequent proceeding in which any party alleges a breach of this Agreement.

Date

For Respondent.

Date

Chester V. Bailey
District Director

EARLY RETIREMENT/SEVERANCE BENEFITS INFORMATION SHEET

The federal Age Discrimination in Employment Act (ADEA) was enacted by a bipartisan Congress in 1967 to protect persons 40 years of age and older from employment discrimination on the basis of their age. It covers public and private sector employers with 20 or more employees, employment agencies, and labor organizations. The U.S. Equal Employment Opportunity Commission (EEOC) is congressionally mandated to enforce the protections of the ADEA. The ADEA prohibits employment decision-making on the basis of age. This applies to all areas of employment, including the provision of benefits. Two types of benefits to which the ADEA applies are early retirement incentive pay/severance programs and health benefits provided to early retirees.

To provide technical assistance to School Boards and Unions, the EEOC is providing this information sheet. The Commission also refers you to our Compliance Manual Section on Employee Benefits. This guidance may be accessed on the Commission's website at www.eeoc.gov.

Early Retirement Incentive Pay/Severance

The ADEA does not bar employers from offering early retirement incentive (ERI) programs. Indeed, the law recognizes that voluntary early retirement incentives can be valuable in permitting employers and employees to work together to manage the size of the workforce.

However, the ADEA was enacted to promote employment of older workers and to prohibit arbitrary age discrimination. Congress has amended the ADEA several times in response to Supreme Court decisions to make clear that it is unlawful to force workers into retirement at any age and that employee benefits must be provided without regard to age, except as specifically permitted by the Act.

The ADEA specifies that bona fide **voluntary** early retirement incentive plans are lawful only if they are consistent with the relevant purpose or purposes of the Act or are specifically permitted by the Act. Employers have substantial leeway in the ways in which they structure voluntary early retirement incentive/severance programs. But the incentives should not differentiate amongst employees based on the employees' ages.

The ADEA sets certain requirements for early retirement incentives to ensure that they are not age discriminatory and it makes clear that certain types of ERIs *will* violate the law. Where the amount of availability of early retirement benefits is tied specifically to an employee's age — that is, if the benefits either decrease or stop altogether as an employee gets older — that will generally amount to age discrimination. This might arise if, for example, an employer offered $10,000 as a base early retirement incentive/severance for 55-year-olds, $8,000 for 56-year-olds, etc., and nothing to persons age 60 or older. The court in *Solon v. Gary Community Sch. Corp.*, 180 F.3d 844 (7th Cir. 1999), agreed with the EEOC that such plans amount to illegal age discrimination. This type of age-based payout is illegal because two otherwise similarly situated retirees would get different benefits based on their different ages; as such, the plan conflicts with the explicit requirements of the statute.

Moreover, by decreasing the benefit with age, the plan clearly coerces premature departure from employment based on age and thereby conflicts with the ADEA's stated purposes of promoting the employment of older workers and prohibiting arbitrary age discrimination. Indeed, it is telling that many such plans were put in place shortly after Congress outlawed mandatory retirement.

The law does permit certain specific types of age-based early retirement incentives — namely: (a) as part of a defined benefit plan, benefits that bridge the gap between early retirement and Social Security eligibility; and (b) as part of a defined benefit plan, payments that constitute the subsidized portion of an early retirement benefit. *See* 29 U.S.C. §§ 623(*l*)(1)(B)(i), (ii). There are very clear requirements for these exceptions. They are explained in detail in the Commission's Compliance Manual Section on Employee Benefits. The following is a non-exhaustive list of types of early retirement incentives that are permissible under the ADEA:

- A flat dollar amount (e.g., $20,000);
- Additional service-based benefits (e.g., $1,000 multiplied by years of service);
- An equal percentage of salary;
- Flat dollar increases in pension benefits (e.g., $200 per month);
- Equal percentage increases in pension benefits (e.g., 20%);
- Imputing years of service and/or age (e.g., adding 5 extra years of service and/or age for pension purposes); or
- Any other incentive that does not differentiate based on age.

Health Benefits for Early Retirees

An employer is not required to offer health benefits to its retirees. Any health benefits it offers to retirees need not, moreover, be the same as those provided to employees. The ADEA also recognizes that the costs of health benefits increase as people get older. The fundamental ADEA principle is that employers must either provide equal benefits without regard to age or, if the benefits are unequal, expend equal cost.

Equal benefits need not be entirely provided by the employer. Medicare benefits can be considered when determining whether employees are receiving equal benefits. Accordingly, retiree health benefits can be fashioned in many non-age-based ways. The following are examples of approaches to structuring lawful plans.

- Provide insurance coverage that treats older and younger retirees equally; for example, some employers allow all retirees to remain in the group health insurance plan maintained for active employees;

- Provide health coverage for all retirees for a certain number of years (e.g., for ten years from the date the employee retires);

- Provide retirees with an equal amount of cash to use toward purchasing health insurance. The employer could not stop or decrease these payments on the basis of age — for example, an employer could not offer to pay $2,000 per year toward health insurance starting with the first year of retirement, but ending at age 63, because this would result in similarly situated younger retirees getting more benefits than older retirees;

- Base the amount of cash provided to all retirees for the purchase of health insurance on non-age factors, such as unused leave;

- Coordinate retiree health benefits with Medicare. Because Medicare eligibility is determined by age, the practice of eliminating or reducing health benefits when a retiree becomes eligible for Medicare constitutes an age-based reduction in benefits. *See Erie County Retirees Ass'n v. County of Erie, PA*, 220 F.3d 193 (3d Cir. 2000), *cert. denied*, 69 USLW 3409 (Mar. 5, 2001). Medicare benefits may, however, be factored into the determination of whether a retiree is receiving benefits equal to those available to younger retirees. For example:

    - If the employer-provided health coverage for retirees is less than or equal to Medicare coverage, the employer is not required to provide additional medical coverage for retirees who become eligible for Medicare;

    - If the employer-provided health coverage for retirees is greater than Medicare coverage, the employer may require that Medicare serve as the primary insurance for Medicare-eligible retirees and supplement this benefit with additional coverage, such as "Medigap" coverage, to ensure that Medicare-eligible retirees receive the same benefit as retirees who are not yet eligible for Medicare.

- To the extent that the employer can demonstrate that the cost of coverage increases with age, the employer may also reduce benefits (or charge more for coverage) to account for that difference, as permitted by EEOC's regulations on employee benefits at 29 C.F.R. §1625.10. Thus, for example, the employer could allow employees to purchase health insurance -- separately or as part of a "cafeteria" plan – in which premiums vary with age, if the premium difference is actuarially justified by age related cost considerations.

RESIGNATION AGREEMENT AND GENERAL RELEASE

This Resignation Agreement and General Release (Agreement) is entered into by and between the Board of Education of the School District of *[School District Name] (*Board or District), and *[Retiree's Name]* (Retiree) with the consent and approval of the *[Teachers' Association Name]* (Association) with the intention of setting forth the terms governing the resignation from employment by Retiree and resolving all issues known and unknown between District, and Retiree pertaining to Retiree's employment with District and his/her separation from District employment.

In consideration of the request by Retiree to voluntarily retire from District employment, the parties agree to the following terms and conditions.

1. The Board hereby approves the voluntary resignation of Retiree for early retirement purposes pursuant to Article ___ of the 1999/01 collective bargaining agreement.

2. All other terms and conditions of the 1999/01 collective bargaining agreement shall apply to Retiree until the effective date of his/her early retirement.

3. Retiree hereby voluntarily resigns from District employment effective the last contract day of the 1999/01 school year.

4. This Agreement constitutes the full and complete agreement between the parties and supersedes and voids any and all prior written and oral agreements between the parties with respect to the subject matter of this Agreement. No promises or obligations are made by the Agreement other than those expressly provided for herein, and there are no understandings or agreements for future benefits other than those stated in this Agreement.

5. This Agreement shall not be construed to be a practice by any of the parties and shall not be construed to establish any precedent regarding interpretation or application of the Master Agreement, nor shall it be used in negotiating future bargaining agreements. It shall not obligate the Board or the Association to enter into any other such Agreement on behalf of any other teacher nor shall it be construed to prevent the Board or the Association from making other arrangements regarding teachers that the Board and the Association deem mutually beneficial.

6. In consideration of the promises set forth herein, Retiree shall and hereby does for himself/herself, his/her successors, heirs and assigns and any person claiming by, through or under them, unconditionally release, waive and forever discharge the District, its Board, Board members, officials, officers, employees, agents, attorneys, and insurers, past or present, (Releasees) individually and in their official capacities, and the successors and assigns of each of them, and any other person, firm or corporation

charged or chargeable with responsibility or liability, their successors and assigns, from any and all legal and equitable rights and claims, demands, damages, costs, attorneys' fees, expenses, liability, or cause of action of any kind or nature whatsoever on account of any acts (including, but not limited to, negligent and non-negligent acts), failure to act or other events arising out of or relating to Retiree's employment by District and/or his/her separation from District, including, but not limited to, claims for emotional distress or other tort claims; claims of wrongful discharge or constructive discharge; and claims based on contract, the Wisconsin Fair Employment Act, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 1983, the Rehabilitation Act of 1973, the Americans with Disabilities Act, the Civil Rights Act of 1991, and any and all other Federal, State or local laws or ordinances dealing with discrimination, including retaliation, but excluding claims arising after the date this Agreement is executed, claims for wages owed, or other claims that are not waivable under the law.

7. The parties agree that the provisions of the Agreement shall be deemed severable, and that the invalidity or unenforceability of any one or more of the provisions of clauses hereof shall not affect the validity or enforceability of the other provisions or clauses hereof except as specifically set forth herein.

8. The parties expressly state that each of them has read and fully understands the terms of the Agreement, that they enter into this Agreement voluntarily and of their own free will, that the parties signing on behalf of each party are authorized to execute this Agreement, and that the parties intend to be legally bound by its terms. The parties further state that they understand that this Agreement constitutes a full, final and binding settlement of the matters covered by this Agreement, and further state that their willingness to enter into this Agreement was not induced by, or based upon, any representation by any other party hereto, or its attorneys, agents, employees or representatives, which is not contained in this Agreement.

9. Retiree hereby tenders a knowing and voluntary waiver of any claims he/she has, might have or might allege under the Age Discrimination in Employment Act and, to that end, further acknowledges the following:

    a. That Retiree has read the foregoing Agreement and fully understands it.

    b. That by executing this Agreement, Retiree is giving up certain rights which he/she may have to bring a claim or cause of action arising out of his/her employment.

    c. That Retiree accepts the consideration to be paid under the terms of this Agreement for the purpose of making a full and final compromise, adjustment and settlement of all matters hereinabove mentioned, regardless of whether such consideration might be regarded as or is too much or too little.

d. That Retiree understands that he/she has a right to consult with an attorney before executing this Agreement, has been advised in writing to consult with an attorney prior to execution of this Agreement, and has been afforded the opportunity to do so.

e. That Retiree understands that he/she has the opportunity to take up to forty-five (45) days to consider this Agreement before signing it and represents that he/she has considered this Agreement within that period of time by signing this Agreement. Retiree further understands that this Agreement must be received by District on the 46th day following his/her receipt of this Agreement in order to be eligible to receive the benefits set forth hereinabove.

f. That Retiree understands that he/she has the right to revoke this Agreement with respect to age discrimination claims within seven (7) days after its execution. To be effective, this revocation must be in writing and delivered to the *[District Administrator's name and school address]*, within this seven (7) day period. Retiree further understands that if he/she revokes this Agreement, the Agreement will not be effective or enforceable, and he/she will not be eligible to receive the benefits set forth hereinabove.

g. That Retiree voluntarily executes this Agreement.

FOR THE DISTRICT

Dated: ________________ By: ______________________________

FOR THE ASSOCIATION

Dated: ________________ By: ______________________________

RETIREE

Dated: ________________ ______________________________

nasb.2001.attachment6.doc

Attachment 7

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Milwaukee District Office

310 West Wisconsin Ave., Suite 800
Milwaukee, WI 53203-2292
PH: (414) 297-1111
TDD: (414) 297-1115
FAX: (414) 297-4133/3146

July 5, 2001

EEOC
vs.

The Equal Employment Opportunity Commission (EEOC or Commission) has determined that its efforts to conciliate the above-referenced charge of discrimination, as required by Section 7 of the Age Discrimination in Employment Act of 1967, as amended, have been unsuccessful. We have not made a determination as to whether any violation occurred in this case, and no further efforts to conciliate will be made by EEOC.

Accordingly, the Commission will cease processing and take no further action on the above-referenced charge. In so doing, the Commission does not certify that your organization is in compliance. Also, our decision to terminate the processing of this charge does not affect the rights of any aggrieved persons to file a private lawsuit.

Sincerely,

Chester V. Bailey

Chester V. Bailey
District Director

Attachment 8

AUG 14

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Milwaukee District Office

310 West Wisconsin Ave., Suite 800
Milwaukee, WI 53203-2292
PH: (414) 297-1111
TDD: (414) 297-1115
FAX: (414) 297-4133/3146

July 30, 2001

EEOC
vs.

Dear Sir/Madam:

The Equal Employment Opportunity Commission (EEOC or Commission) is willing to conciliate the above-referenced charge if your organization agrees to come into compliance with the well-settled law relating to cash-based early retirement incentives. We would conciliate incentives that include, for example, severance, stipends, or cash payments for accrued but unused leave that are reduced or eliminated on the basis of age. Under this conciliation, the Commission will not seek a change to early retirement incentive plans that offer extended health care coverage (generally in the form of a Medicare bridge).

If your organization requires guidance or technical assistance to help facilitate your efforts to design early retirement incentives that comply with the Age Discrimination in Employment Act (ADEA), please feel free to contact Monty Johnson, Deputy Director, at (414) 297-1244.

Sincerely,

Chester V. Bailey

Chester Bailey,
District Director

cc: Uniserv Director
Coulee Region United Educators
2020 Caroline Street
LaCrosse, WI 54603

Attachment 9

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Milwaukee District Office

310 West Wisconsin Ave., Suite 800
Milwaukee, WI 53203-2292
PH: (414) 297-1111
TDD: (414) 297-1115
FAX: (414) 297-4133/3146

July 9, 2001

EEOC
vs.

Dear Sir/Madam:

The Equal Employment Opportunity Commission (EEOC or Commission) is willing to conciliate the above-referenced charge if your school district agrees to come into compliance with the well-settled law relating to cash-based early retirement incentives. We would conciliate incentives that include, for example, severance, stipends, or cash payments for accrued but unused leave that are reduced or eliminated on the basis of age. Under this conciliation, the Commission will not seek a change to early retirement incentive plans that offer extended health care coverage (generally in the form of a Medicare bridge).

The Commission earlier provided written technical assistance to help facilitate your efforts to design early retirement incentives that comply with the Age Discrimination in Employment Act (ADEA). If you require additional guidance, however, please feel free to contact Monty Johnson, Deputy Director, at (414) 297-1244.

Sincerely,

Chester V. Bailey

Chester V. Bailey,
Director

cc: Lathrop & Clark
Attn: David E. Rohrer
P. O. Box 1507
Madison, WI 53701-1507

Attachment 10

I

107TH CONGRESS
1ST SESSION

H. R. 2558

To amend the Age Discrimination in Employment Act of 1967 with respect to voluntary early retirement benefits and medical benefits.

IN THE HOUSE OF REPRESENTATIVES

JULY 18, 2001

Mr. PETRI (for himself, Mr. KIND, Mr. GREEN of Wisconsin, Mr. SENSENBRENNER, Mr. RYAN of Wisconsin, Ms. BALDWIN, Mr. BARRETT of Wisconsin, Mr. KLECZKA, and Mr. PETERSON of Minnesota) introduced the following bill; which was referred to the Committee on Education and the Workforce

---

A BILL

To amend the Age Discrimination in Employment Act of 1967 with respect to voluntary early retirement benefits and medical benefits.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Teacher Voluntary Early Retirement Incentive Act of 2001".

SEC. 2. GOVERNMENTAL AND HIGHER EDUCATION VOLUNTARY EARLY RETIREMENT INCENTIVE PLANS.

(a) AMENDMENT.—Section 4(m) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 623) is amended to read as follows:

"(m) VOLUNTARY RETIREMENT INCENTIVE PLANS.—Notwithstanding subsection (f)(2)(b), it shall not be a violation of subsection (a), (b), (c), or (d) solely because a voluntary early retirement incentive plan maintained by a local educational agency (as defined in section 14101 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 8801)) or an institution of higher education (as defined in section 101 of the Higher Education Act of 1965 (20 U.S.C. 1001)), provides for supplemental benefits to an employee that are reduced or eliminated on the basis of the employee's age at the time of such employee's retirement, if—

"(1) the employer does not implement with respect to such employee any age-based reduction or elimination of benefits that are not such supplemental benefits, except as permitted by other provisions of this Act;

"(2) such supplemental benefits are in addition to any retirement or severance benefits which have been offered generally to employees, independent of any early retirement or exit-incentive plan, within the preceding 365 days; and

"(3) with respect to any plan supplemental benefits for which an employee first becomes eligible after the enactment of Teacher Voluntary Early Retirement Incentive Act of 2001—

"(i) any employee who attains the minimum age and satisfies all non-age based conditions for receiving a benefit under the plan has an opportunity lasting not less than 180 days to elect to retire, and the plan does not require retirement to occur sooner than 180 days after such election; and

"(ii) any employee who is not eligible to receive the maximum supplemental benefits provided under the plan because of the age of such employee at the time of retirement was afforded a reasonable opportunity to receive such maximum benefits at a previous time in such employee's employment.".

(b) CONSTRUCTION.—Except as otherwise provided in section 4(m)(3) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 623(m)(3)), the amendment made by subsection (a) shall apply in determining whether a voluntary employee early retirement incentive plan maintained by a local educational agency (as defined in section 14101 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 8801)) or an institution of higher education (as defined in section 101 of the Higher Education Act of 1965 (20 U.S.C. 1001)), was in violation of subsection (a), (b), (c), or (e) of section 4 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 621 et seq.) after January 1, 1996.

SEC. 3. RETIREE MEDICAL BENEFITS COORDINATED WITH MEDICARE AND OTHER GOVERNMENTAL AND EMPLOYER BENEFIT PLANS; VOLUNTARY EARLY RETIREMENT INCENTIVE PLANS MAINTAINED BY LOCAL EDUCATIONAL AGENCIES.

(a) VOLUNTARY EARLY RETIREMENT INCENTIVE PLANS MAINTAINED BY LOCAL EDUCATIONAL AGENCIES.—Section 4(*l*)(1) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 623(*l*)(1)) is amended by adding at the end the following:

"A voluntary early retirement incentive plan maintained by a local educational agency (as defined in Section 14101 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 8801)) which makes payments or supplements as provided in clauses (i) or (ii) of subparagraph (B) in coordination with a defined benefit plan (as defined in

Section 3(35) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(35) maintained by a state or an agency thereof shall itself be deemed to constitute a defined benefit plan for purposes of subparagraph (B).".

(b) RETIREE MEDICAL BENEFITS COORDINATED WITH MEDICARE BENEFITS.—Section 4(*l*) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 623(*l*)) is amended by adding to the end the following:

"(4) It shall not be a violation of subsection (a), (b), (c), or (e) solely because an employee benefit plan (as defined in section 3 of the Employment Retirement Income Security Act of 1974 (29 U.S.C. 1002(3)) provides for medical benefits for retired participants that are altered, reduced, or eliminated when the participant is eligible for medical benefits under title XVIII of the Social Security Act (42 U.S.C. 1395 et seq.) or an employee benefit plan maintained by a State or an agency thereof.".

(c) CONSTRUCTION.—(1) The amendments made by subsections (a) and (b) shall apply in determining whether a voluntary early retirement incentive plan maintained by a local educational agency (as defined in Section 14101 of the Elementary and Secondary Education Act (20 U.S.C. 8801)) or an employee benefit plan (as defined in Section 3 of the Employee Retirement Income Security

Act of 1974 (29 U.S.C. 1002(3)) providing medical benefits for retired participants, was in violation of subsection (a), (b), (c), or (e) of section 4 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 623) at any time subsequent to January 1, 1996.

(2) No inference may be drawn from the amendment made by subsection (a) as to whether a voluntary early retirement incentive plan maintained by a local educational agency constitutes, or at any time before or after the effective date of subsection (a) constituted, a defined benefit plan (as defined in Section 3(35) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(35)) for any purpose, including section 4 of the Age Discrimination in Employment Act of 1967.

○

CURRENT ISSUES IN EMPLOYMENT DISCRIMINATION: EARLY RETIREMENT INCENTIVE PLANS AND THE ADEA

NATIONAL SCHOOL BOARDS ASSOCIATION
COUNCIL OF SCHOOL ATTORNEYS
ADVOCACY SEMINAR 2001
October 25-27, 2001
Hilton Alexandria Old Town - Alexandria, Virginia

Materials Prepared By:

Shamus P. O'Meara
952.806.0438
SPO@Johnson-Condon.com

Mark R. Azman
952.806.0408
MRA@Johnson-Condon.com

JOHNSON & CONDON, P.A.
7235 OHMS LANE • MINNEAPOLIS, MINNESOTA 55439-2152
TELEPHONE: 952.831.6544 • FACSIMILE: 952.831.1869

TABLE OF CONTENTS

Minnesota's Legislative History of Early Retirement Benefits 1

EEOC Enforcement of the ADEA Against School Districts 6

MSBAIT vs. EEOC and Education Minnesota 10

Current and Proposed Legislation 21

Current EEOC Enforcement Posture 24

© 2001 Shamus P. O'Meara and Mark R. Azman

MINNESOTA'S LEGISLATIVE HISTORY OF EARLY RETIREMENT BENEFITS

There is a lengthy history in Minnesota recognizing and encouraging eligible teachers to retire at earlier ages through approval of early retirement incentives. In the early 1970's, the legislature enacted a "severance pay" statute authorizing school districts "to pay severance pay to all of its employees and to establish, prescribe and promulgate provisions, rules and regulations for the payment of such severance pay upon leaving employment prior to the normal retirement date." Minn. Stat. § 465.72 (1973).[1] A 1979 amendment to Minnesota Statutes, section 465.72 retained a 100-day limit on severance pay for early retirement for employees covered by the statute, with the exception of teachers, who were given a limit of one year of pay. *Id.* The following year, the legislature enacted the Teacher Early Retirement Incentive Program ("TERIP"). *Id.* (Minn. Stat. §125,611). As a consequence, in addition to the state law enabling school districts to set up early retirement incentive plans, the Minnesota legislature authorized, and appropriated money for, State reimbursement to school districts (up to 50%) that set up early retirement plans for teachers and paid out monies pursuant to such plans.

The reference to teachers in section 465.72 was deleted the next year. School districts were thus afforded the option of setting up their own incentive plan for teacher retirement pursuant to Minn. Stat. § 465.72, or use the state-authorized TERIP plan and receive 50 percent

---

[1] Minn. Stat. § 465.72 (1973) ("[A]ll counties, cities, villages, boroughs, townships and **school districts** are hereby authorized and empowered to pay severance pay to all of its employees and to establish, prescribe and promulgate provisions, rules and regulations for the payment of such severance pay upon leaving employment **prior to the normal retirement date**.") (emphasis added).

© 2001 Shamus P. O'Meara and Mark R. Azman

reimbursement from the State. Although school districts could choose to adopt the TERIP plan to receive state reimbursement, they retained the right to adopt their own plans for teachers that would not be reimbursed. *Id.* In 1984, The Minnesota Attorney General issued an opinion confirming that school districts had authority to establish a severance pay program under section 465.72 independent from the TERIP program. *Id.*[2]

In 1995, the Minnesota Supreme Court, in State by Beaulieu v. Independent Sch. Dist. No. 624, 533 N.W.2d 393 (Minn. 1995), held that section 465.72 reflected the Minnesota legislature's "broad grant of authority for school districts to manage their resources appropriately and ease employee transition out of the school district work force," including the authority to differentiate between employees whose ages qualify them for early retirement incentives and those who do not qualify. *Id.* at 396. Eleven years earlier, in Patterson v. ISD 709, 742 F.2d 465 (8th Cir. 1984), the Eighth Circuit held that a voluntary, collectively bargained early retirement incentive plan was "intrinsically valid."[3]

School Districts relied on Minnesota's long history of approving early retirement incentives for teachers in their collective bargaining for such plans. As guidance in formulating a retirement plan structure, many districts, in conjunction with Education Minnesota, (which was acting on behalf of its individual teacher members[4]) modeled their plans on the State's TERIP plan. The TERIP statute provided a minimum age eligibility requirement for early retirement, and it decreased the amount of benefits for each year above age 55. In addition, Minn. Stat. § 471.61 grants school districts the discretion to continue making contributions for group insurance premiums for employees. This statute also authorizes school districts to develop plans for the payment of health, dental and life insurance costs to eligible retired employees. These employer-paid early retirement insurance benefits serve the same legitimate purpose recognized by the legislature for early retirement incentives plans. School districts also relied on this legislative authority in setting up such plans through their collective bargaining with Education Minnesota.[5]

---

[2] Section 465.72 was subsequently amended in 1981, 1986, and 1988; each amendment broadened its application. This statute continues in effect today. TERIP has been altered by subsequent amendments, including the elimination of State reimbursement of early retirement incentive payments. At present, the statute exists as Minn. Stat. § 122A.48, and explicitly recognizes that "early retirement incentives" apply to those under the age of 65. *Id.*

[3] *Id.* at 468. The court found that an early retirement incentive established pursuant to section 125.611 did not violate the ADEA, stating that "to effect the purpose of encouraging early retirement, the sliding scale of diminishing benefits is manifestly appropriate." *Id.* at 469.

The State pays the largest share of education finance appropriation to districts through its general education aid, which is intended to provide the basic financial support for education programs in school districts as well as equalize the differences in property wealth between districts.[6] In addition, categorical revenue formulas are generally used to meet costs that vary significantly between districts (such as special education) or promote certain types of programs (for instance, career and technical aid). Moreover, the State issues and pays property tax credits which reduce the amount of property taxes paid for school districts in Minnesota. Beginning in 1998-99, a new education homestead credit became effective, reducing overall school levies. School districts also receive funding through property tax levies which are usually determined as part of a formula that includes mostly State aid.

---

[4] Minnesota teachers, through Education Minnesota, their statewide labor organization, have been involved over several years in advocating for the specific early retirement incentive programs at issue, including extensive lobbying efforts with the legislature.

[5] The MSBA provided general assistance to school districts to set up early retirement incentive plans. It did so in reliance on the lengthy legislative history in Minnesota which had approved the use of such plans, the Minnesota Supreme Court's recognition of the legislature's grant of authority to school districts to do so, and the specific and substantive involvement of Education Minnesota and its local affiliates on behalf of the teacher retirees in advocating and collectively bargaining for the plans. The involvement of The MSBA and Minnesota school districts with these plans also was based on a specific understanding, as conveyed by representatives of Education Minnesota, that the individual union member retirees were being represented by Education Minnesota and its local affiliates throughout this process, and that the teacher members were very interested, and had specifically requested, the inclusion of the early retirement incentive plans in their collective bargaining agreements with the Participants.

The State provides revenue to each school district based upon a per pupil unit formula. Minnesota Statute 126 (specifically, section 126C.05, subd. 1 and 126C.10, subd. 2) are examples of Minnesota statutes dealing with such formulas. The total number of students at each grade level is multiplied by each student's per pupil unit number; the totals for each grade level are added together to determine the total number of pupil units in a particular school district. To assist the State in funding its public education system, the State requires each school district to levy a uniform property tax on property located within the district's boundaries. Any gap between the school district guaranteed funding based upon total pupil units and the local revenues raised by the taxes are paid by the State. The State also has a history of assisting in the payment of special revenue to certain school districts, including several MSBAIT Plan Participants.

Minnesota school districts receive most of their funding from the State. Fiscal analyses done by the Minnesota House of Representatives demonstrates that Minnesota school districts, for the school year 1998 through 1999, were predominantly financed by State funds with an overall percentage of State funding of 68.2%. For the 2000-01 school year, the State appropriated 65.1% of the funding for Minnesota school districts and provided another 6.5% in tax relief assistance to districts. Since Minnesota school districts, including Plan Participants, are financed predominately by the State, funds paid to Participants by the State are pooled with other Participants' contributions to MSBAIT which, in turn, are used in the payment of claims covered under the Trust Plan. Thus, any Trust Plan funds expended to pay claims involving EEOC charges are derived from the State.

---

[6] In the last legislative session (2001), new legislation was passed radically altering the method by which the State finances school districts, with the State now providing the majority of revenue rather than local units of government through property tax levies. This discussion is provided as background.

EEOC ENFORCEMENT OF THE ADEA AGAINST MINNESOTA SCHOOL DISTRICTS

The Federal Age Discrimination and Employment Act ("ADEA") and the Minnesota Human Rights Act prohibit discrimination against employees with respect to compensation and other terms and conditions of employment due to their age. In 1990, the ADEA was amended to preclude age discrimination and the provision of employee benefits, including early retirement incentive plans.

In 1999, the United States Equal Employment Opportunity Commission ("EEOC") began charging over 300 Minnesota school districts with age discrimination under the ADEA with regard to their retirement, severance, health and insurance plans.[7] This action was taken despite the Minnesota Legislature's 27 year history of approving early retirement incentive plans for school districts, the Minnesota Supreme Court and Federal Appellate Court's recognition of their validity, the voluntary nature of the plans, and the fact the teachers, through their state and local unions, had requested, lobbied and collectively bargained for these plans over many years. Rather than use its statutory "advice" powers to work with school districts to resolve its concerns, the EEOC charged districts with age discrimination, demanded 200% of the "damages" for purportedly wronged teachers, and then, without engaging in good faith conciliation as required by federal statute, notified school districts that its efforts to resolve the matter informally had failed and that it was now ready to sue.

---

[7] In addition, over 200 school districts in Wisconsin received similar charges. Further, the EEOC has sued school districts in Pennsylvania, Missouri, and Illinois based upon their use of ERIPs. The EEOC named the teachers' unions in those suits, seeking back pay.

© 2001 Shamus P. O'Meara and Mark R. Azman

School districts have expended tens of thousands of dollars defending against the EEOC's action. They face significant additional financial exposure, possibly in the tens of millions of dollars, if the EEOC is successful on its claims. The Minnesota Constitution mandates that public education be uniform, thorough and efficient. Yet financial loss of this magnitude would have serious and dramatic adverse effects on school districts, most notably by jeopardizing the fundamental right of Minnesota citizens to an appropriate education.

On August 2, 2000, the MSBA met with EEOC representatives. EEOC refused to discuss any compromise resolution of the charges and advised that Minnesota school districts will face significant litigation if they did not agree to pay 200% of the damages the EEOC claimed is owed individual retirees. The EEOC was not receptive to alternative forms of conciliation beyond their own proposals.

Several school districts have expended thousands of dollars addressing the EEOC action. In a few cases, because of their relatively small financial exposure, school districts have agreed to the EEOC conciliation terms and paid out money in settlement. Presently, several school districts with considerably larger exposures are concerned about their potential financial loss if the EEOC succeeds, the considerable defense costs they are incurring, and how these issues are affecting the collective bargaining process with the union.

In August, 2000, in order to avoid several hundred lawsuits by the EEOC against Minnesota school districts, MSBAIT commenced a federal declaratory judgment lawsuit (discussed in detail below) against the EEOC and Education Minnesota. This action seeks a declaration that the EEOC's enforcement of the ADEA against Minnesota school districts is unconstitutional, and that school districts are afforded Eleventh Amendment immunity from private lawsuits under the ADEA.

In October 2000, the MSBA met with Governor Ventura's office and the Minnesota Attorney General's Office. The Attorney General's Office indicated that it will not become involved in any of the legal issues in the declaratory judgment action. Further, Governor Ventura's office has not provided any substantive assistance to the MSBA's efforts.

On December 5, 2000, the MSBA met with the Wisconsin Association of School Boards ("WASB") and Wisconsin Governor Tommy Thompson's office. Governor Thompson wrote a December 5, 2000 letter to the Chairwoman of the EEOC noting his extreme concern that the EEOC targeted Minnesota and Wisconsin school districts with age discrimination claims rather than working with the states and school boards to amicably resolve its concerns. Governor Thompson offered to assist the MSBA's efforts in Minnesota and on a national level. Governor Thompson and the WASB have sought the involvement of the U.S. Secretary of Labor to exempt school districts from ADEA enforcement and obtain a moratorium on the present charges until the issues can be resolved.[8] The MSBA is assisting these efforts as well as facilitating the involvement of other groups on these issues.

Recently, the MSBA consulted with The National School Boards Association, which advises that it also seeks an amendment to the ADEA exempting school districts from ADEA enforcement. Also, the WASB is involving a Washington D.C. lobby group to work with the Congressional delegations and other national interests to resolve these issues.

---

[8] The departure of Governor Thompson has not dampened Wisconsin's commitment. Governor McCallum, as well as most of Wisconsin's Congressional delegation, also supports the efforts to resolve the EEOC's charges.

Locally, the MSBA has consulted with The League of Minnesota Cities and Minnesota Counties Insurance Trust as well as other parties on these issues. The MSBA is advised that several Minnesota counties have received charges, and that cities expect they will also receive EEOC charges.

MSBAIT vs. EEOC AND EDUCATION MINNESOTA - STATUS

A. Introduction - Basis for Lawsuit

As discussed above, from the early 1970s onward, the Minnesota Legislature has specifically approved of the use of early retirement incentive plans and initially provided financial incentives to school districts that elected to use them. These plans were subsequently approved by the Minnesota Supreme Court and recognized by the 8th Circuit Court of Appeals. Importantly, the programs were specifically requested, collectively bargained for, and approved by individual teacher retirees through their state and local unions.

Despite this significant history, the EEOC has targeted Minnesota and Wisconsin School Districts with age discrimination claims relating to their voluntary early retirement incentive programs. The EEOC's decision has caused over 300 Minnesota School Districts to spend hundreds of thousands of dollars in attorney fees to respond to the EEOC's audit requests and defend against the charges. Moreover, potential monetary exposure to Minnesota School Districts relative to these claims, should the EEOC prevail, is in the nature of several million dollars, perhaps in the tens of millions of dollars, depending upon the extent of the EEOC's claims involving health plans. An exposure of this magnitude will have serious and dramatic adverse effects on school districts and their ability to provide students with an excellent education. As is well known, school districts have finite resources available for education. Nevertheless, the EEOC's continued assault against Minnesota school districts has forced many districts to pay thousands of dollars in legal fees in a year in which school funding is being reduced and hundreds of teachers are being laid off.

The EEOC's initial efforts at conciliation were illusory at best. Typically, the EEOC would advise a school district that it was prepared to begin conciliation and would include a proposed Conciliation Agreement requiring the school district pay all employees affected by the allegedly discriminatory policy double the amount of money lost within a two-year time period prior to the filing of the charge. When the school district would fail to immediately accept the proposed Conciliation Agreement, the EEOC would respond by concluding that efforts to conciliate the charge have been unsuccessful, that it would make no further efforts to conciliate and that it would forward the case for possible litigation.

In an effort to avoid several hundred lawsuits against individual school districts by the EEOC, MSBAIT commenced a declaratory judgment action in federal court in August 2000 against the EEOC and Education Minnesota to address the legal issues involved with the EEOC's charges that school districts' voluntary early retirement incentive programs violate the ADEA.

B. Allegations Against the EEOC

A copy of the Complaint is attached as Exhibit A (without attachments). The discussion that follows provides a summary of the allegations against the EEOC and Education Minnesota.

In Count I, MSBAIT alleged that the ADEA may not be constitutionally applied to state or local governments (including school districts) since it is legislation that exceeds Congress's power under, inter alia, the Commerce Clause, the Fourteenth Amendment, and principals of state sovereignty and federalism.

Summary of Fourteenth Amendment Argument.

The recent decisions of the United State Supreme Court in Kimel v. Florida Bd. of

Regents, 528 U.S. 62, 120 S.Ct. 631 (2000) and City of Boerne v. Flores, 521 U.S. 507 (1997) provide the fundamental basis for the Fourteenth Amendment argument.

In City of Boerne v. Flores, 521 U.S. 507 (1997), Archbishop Flores applied to the City Council of the City of Boerne, Texas for a building permit to enlarge a church. Id. at 512. City officials denied the permit request under a recently enacted city ordinance. Id. The Archbishop sued the City alleging, inter alia, a violation of the Religious Freedom Restoration Act (RFRA). Id. Upon a constitutional challenge, the District Court held that by enacting RFRA, Congress exceeded the scope of its enforcement power under § 5 of the Fourteenth Amendment, but the Fifth Circuit reversed. Id. The Court granted certiorari to consider the validity of RFRA under the Fourteenth Amendment. Id.

Writing for the majority, Justice Kennedy began the analysis with a fundamental statement of constitutional jurisprudence:

> Under our Constitution, the Federal Government is one of enumerated powers. M'Culloch v. Maryland, 4 Wheat. 316, 405, 4 L.Ed. 579 (1819); see also The Federalist No. 45, p. 292 (C. Rossiter ed. 1961) (J. Madison). The judicial authority to determine the constitutionality of laws, in cases and controversies, is based on the premise that the "powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." Marbury v. Madison, 1 Cranch 137, 176, 2 L.Ed. 60 (1803).

Id. at 516. Relying on their Fourteenth Amendment enforcement power, Justice Kennedy explained, Congress enacted RFRA. "It is also true, however, that as broad as the congressional enforcement power is, it is not unlimited." Id. at 518 (internal quotations omitted).

> Congress' power under § 5, however, extends only to "enforc[ing]" the provisions of the Fourteenth Amendment. The Court has described this power as "remedial," South Carolina v. Katzenbach, supra, at 326, 86 S.Ct., at 817-818. The design

> of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the "provisions of [the Fourteenth Amendment].

Id. at 519. Justice Kennedy then observed that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect." Id. at 520 (emphasis added).

With these principles in mind, the Court found RFRA to be "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." Id. at 532. RFRA was not confined to those areas where constitutional violations would occur, but improperly applied to virtually every level of government. Id. The legislative record also failed to support the need for RFRA. Id. at 530.

The Court found RFRA unconstitutional: "Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance." Id. at 536.

The congruence and proportionality test announced in Boerne is applicable to MSBAIT's Fourteenth Amendment challenge. In other words, if the ADEA is "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior," then by enacting the ADEA, Congress violated its

© 2001 Shamus P. O'Meara and Mark R. Azman

enforcement power under the Fourteenth Amendment. Id. at 531.

In Kimel v. Board of Regents, 528 U.S. 62 (2000), the Supreme Court had the opportunity to review this issue, and, relying on Boerne's congruence and proportionality test, concluded that "the ADEA is not 'appropriate legislation' under § 5 of the Fourteenth Amendment." Id. at 82-83. The Court initially noted that the "substantive requirements the ADEA imposes on state and local governments are disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act." Id. at 83. The Court then observed that its equal protection jurisprudence permits "States to draw lines on the basis of age when they have a rational basis for doing so at a class-based level, even if it is probably not true that those reasons are valid in the majority of cases." Id. at 86. "Judged against the backdrop of our equal protection jurisprudence, it is clear that the ADEA is "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." Id. (quoting Boerne, 521 U.S., at 532).

The Court then noted that although the ADEA prohibits very little conduct likely to be held unconstitutional, its "task is to determine whether the ADEA is in fact just such an appropriate remedy or, instead, merely an attempt to substantively redefine the States' legal obligations with respect to age discrimination. One means by which we have made such a determination in the past is by examining the legislative record containing the reasons for Congress' action." Id. at 88 (again citing Boerne, 521 U.S. at 530-31). The Court's analysis of the legislative record revealed the following:

> Our examination of the ADEA's legislative record confirms that Congress' 1974

© 2001 Shamus P. O'Meara and Mark R. Azman

> extension of the Act to the States was an unwarranted response to a perhaps inconsequential problem. Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation. The evidence compiled by petitioners to demonstrate such attention by Congress to age discrimination by the States falls well short of the mark. That evidence consists almost entirely of isolated sentences clipped from floor debates and legislative reports.

Id. at 89. Upon this record, the Court held as follows:

> In light of the indiscriminate scope of the Act's substantive requirements, and the lack of evidence of widespread and unconstitutional age discrimination by the States, we **hold that the ADEA is not a valid exercise of Congress' power under §5 of the Fourteenth Amendment.** The ADEA's purported abrogation of the States' sovereign immunity is **accordingly** invalid.

528 U.S. at 91 (emphasis added). Based upon the Fourteenth Amendment principles discussed in Boerne and applied in Kimel, the ADEA is unconstitutional and may not be enforced by the EEOC.

Summary of Commerce Clause Argument

The ADEA also exceeds Congress' authority under the Commerce Clause, the Tenth Amendment, and principles of state sovereignty and federalism. There is no express jurisdictional element limiting the scope of the ADEA to a discrete set of employment actions that affect interstate commerce. Moreover, as determined in Kimel, there is no evidence that age discrimination by state and local governments substantially affects interstate commerce. On the contrary, age discrimination by state and local governments does not *substantially* interfere with anything; it is but an inconsequential problem. Kimel, 528 U.S. at 89.

Only a cursory review of the Supreme Court's jurisprudence during the last decade reveals what many commentators have recognized as a surge in federalism signaling a fundamental shift of

© 2001 Shamus P. O'Meara and Mark R. Azman

the federal balance of power in favor of the States. Over the course of the 1990s and into this century, the Supreme Court has issued several far-reaching opinions which have narrowed the scope of Congress' power to enact legislation pursuant to the Commerce Clause, the Tenth Amendment, the Eleventh Amendment, the Fourteenth Amendment, and general principles of federalism and state sovereignty.[9]

---

[9] See e.g., New York v. United States, 505 U.S. 144 (1992) (holding the "take-title" provision of the Low-Level Radioactive Waste Policy Amendments Act was beyond the Article I powers of Congress and therefore a violation of the *Tenth Amendment*); United States v. Lopez, 514 U.S. 549 (1995) (holding the Gun-Free School Zones Act exceeded the power of Congress to regulate interstate commerce under the *Commerce Clause*); Seminole Tribe v. Florida, 517 U.S. 44 (1996) (holding that Congress does not have the power under the Indian Commerce Clause to abrogate the States' *Eleventh Amendment* immunity); City of Boerne v. Flores, 521 U.S. 507 (1997) (holding that the Religious Freedom Restoration Act exceeded Congress' enforcement power against a local government under Section 5 of the *Fourteenth Amendment*); Printz v. United States, 521 U.S. 898 (1997) (holding that the background check provision of the Brady Handgun Violence Prevention Act exceeded Congress' Article I power and thus violated the *Tenth Amendment* and was inconsistent with the constitutional systems of *federalism and separation of powers*.); Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 527 U.S. 627 (1999) (holding the Patent and Plant Protection Remedy Clarification Act violated the *Eleventh Amendment* and the *Fourteenth Amendment* as an invalid exercise of Congress' authority in authorizing federal court jurisdiction for patent claims against state governments); College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 527 U.S. 666 (holding the Trademark Remedy Clarification Act was in violation of the *Eleventh and Fourteenth Amendments* since Congress exceeded its authority in authorizing federal court jurisdiction for Lanham Act claims against state governments); Alden v. Maine, 527 U.S. 706 (1999) (holding that the State of Maine could not be sued in a Maine court for violating the Fair Labor Standards Act without its consent, pursuant to the *Eleventh Amendment*.); U.S. v. Morrison, 529 U.S.598 (2000) (holding that a federal civil cause of action within the Violence Against Women Act was beyond Congress' scope of authority under both the *Commerce Clause* and the *Fourteenth Amendment*) (see also id. 529 U.S. at --- (Souter, J. dissenting) (observing Court's recent decisions have eroded commerce power); Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000) (holding the ADEA, as applied to state and local governments, was an invalid exercise of Congress' power under the *Fourteenth Amendment*, and therefore an invalid abrogation of sovereign immunity under the *Eleventh Amendment*); Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. ---, 121 S.Ct. 675 (2001) (holding that, in order to avoid

The U.S. Reports are not the only place the Court has expressed concerns "about congressional Acts 'federalizing' entire areas of law traditionally thought to be reserved for state regulation, 'commandeering' state resources and officers for the advancement of federal policies, or subjecting states to private causes of action in federal court." Cristian M. Stevens, Revolutionary or Aberrational?: The Status of the Supreme Court's Recent Federalism Cases in the Eighth Circuit, 44 St. Louis U. L.J. 529, 531 (2000) (internal quotes in original). "Since as early as 1991, Chief Justice Rehnquist consistently has stressed, in his annual *Year-End Report of the Federal Judiciary*, the importance of a proper balance between federal and state court jurisdiction and has requested that Congress restrain itself when considering the addition of new crimes to the United States Code. * * * Chief Justice Rehnquist admonished Congress to consider carefully the impact of the increased caseload on the federal courts before further expanding federal jurisdiction. He then reiterated the federal judiciary's 'long-standing position that federal prosecutions should be limited to those offenses that cannot or should not be prosecuted in state courts.'" Id. at 532-33 (internal quotations in original).

The Court's resurgent federalism confirms the notion that the Commerce Clause and the Tenth Amendment continue to both constrain and empower Congress. Of particular importance is

---

constitutional problems concerning the scope of Congress' *Commerce Clause* power, a federal law regulating migratory birds did not apply to intrastate waters); University of Alabama at Birmingham Bd of Trustees v. Garrett, 531 U.S. --- (2001) (holding that the Americans with Disabilities Act as applied to state and local governments, was an invalid exercise of Congress' power under the *Fourteenth Amendment*, and therefore an invalid abrogation of sovereign immunity under the *Eleventh Amendment*); see also id. 531 U.S. at --- (Breyer, J. dissenting) (observing Court's recent decisions have eroded Congress's Section 5 power).

the Court's Commerce Clause discussion in United States v. Lopez, 514 U.S. 549 (1995). There, the Court stated that Congress has the power to legislate under the Commerce Clause, but only to the extent its enactments govern: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce; and (3) "those activities that substantially affect interstate commerce." 514 U.S. 549, 558-59. By these factors, the Court has conveyed the message that the Commerce Clause can no longer be invoked by Congress as a license to legislate over conduct which has little to do with interstate commerce.

Under Lopez, the ADEA can no longer be considered to comply with the strictures of the Commerce Clause, the Court's decision in EEOC v. Wyoming, 460 U.S. 226 (1983) notwithstanding. It stretches the bounds of rationality and reason to conclude that the ADEA was enacted as a response to a problem that substantially affected interstate commerce in light of Kimel's determination that the "ADEA's legislative record confirms that Congress' 1974 extension of the Act to the States [and local governments] was an unwarranted response to a perhaps inconsequential problem." Kimel, 528 U.S. at 89 (noting that "Congress never identified any pattern of age discrimination by the States . . ."). In short, the inconsistency between Lopez' demand for a *substantial* affect on interstate commerce and Kimel's finding of *inconsequence* is irreconcilable. Until such time as Congressional findings or the ADEA itself supports a sufficient constitutional link between state and local age discrimination and interstate commerce, the power to extend such legislation to state and local governments remains solely with the States. Extension of the ADEA to State and local governments, thus, violates the Commerce Clause and the Tenth Amendment.

© 2001 Shamus P. O'Meara and Mark R. Azman

In Count II, MSBAIT alleged that school districts are arms of the State, and therefore entitled to 11th Amendment immunity for any private lawsuits under the ADEA arising from the ERIPs.[10]

In the alternative, MSBAIT alleged in Count III, that the ERIPs comply with the ADEA.

MSBAIT also sought an injunction in Count IV prohibiting the EEOC from initiating suit against any school districts for violations of the ADEA based upon the ERIPs.

Count V seeks to bind Education Minnesota to the legal effect of the Court's rulings with respect to the issues raised in the Complaint.

C. Summary Judgment Motions

1. MSBAIT Summary Judgment Motion

Shortly after filing suit, MSBAIT moved for partial summary judgment. Specifically, MSBAIT seeks a ruling rendering the ADEA invalid under the Commerce Clause, the Tenth Amendment, the Fourteenth Amendment, and principles of state sovereignty and federalism, which would preclude EEOC enforcement of the ADEA against school districts.

MSBAIT also requested the Court find that the districts are entitled to 11th Amendment immunity against private suits or suits by the Unions under the ADEA.

2. EEOC Motion to Dismiss

At the time MSBAIT moved for summary judgment, the EEOC concurrently moved the

---

[10] This legislative session saw the enactment of a new law in Minnesota, discussed below, waiving the State's 11th Amendment immunity for ADEA claims. This Act, however, does not waive immunity for claims initiated by the Unions.

Court for dismissal of the Complaint for lack of jurisdiction and failure to state a claim for relief.

3. Education Minnesota Motion to Dismiss

As with the EEOC, the Unions also moved the Court for dismissal for lack of jurisdiction, arguing there is no case or controversy between MSBAIT and the Unions.

The Unions also argued that MSBAIT lacked standing to initiate the claims asserted in the Complaint.

4. Summary

Oral argument on the various cross motions occurred on March 22, 2001, before Magistrate Judge Raymond Erickson in Duluth. We are still awaiting a decision from the Court.

5. Court's Ruling

On August 15, 2001, Magistrate Judge Raymond Erickson issued a Report and Recommendation granting the EEOC's Motion to Dismiss for lack of jurisdiction. Specifically, the Court ruled that the EEOC's administrative proceedings against the School Districts are not sufficiently ripe for judicial review. "Absent an enforcement action," the Court held, "neither the EEOC, or any charging person, can require the School Districts to take any remedial action." As such, the Court ruled there is no ripe "case or controversy", and recommended dismissal of the case.

Similarly, the Court ruled that there was no ripe case or controversy between the Unions and Plaintiffs since the Unions had filed no charges. Further, because the claims against the EEOC were not ripe, the claims against the Unions pursuant to their status as signatories to the various collective bargaining agreements, was moot.

© 2001 Shamus P. O'Meara and Mark R. Azman

On appeal to the District Court, Judge Richard Kyle affirmed and adopted Magistrate Judge Erickson's Report. The time for appeal to the 8th Circuit expires on November 13, 2001.

CURRENT AND PROPOSED LEGISLATION

Both Minnesota and the United States Congress have considered or will be considering legislation responding to the EEOC's enforcement activity against school districts in Minnesota, Wisconsin and elsewhere.

A. Minnesota.

On May 22, 2001, Governor Jesse Ventura signed into law an Act that waives the State of Minnesota's 11th Amendment immunity for claims arising under the ADEA. The Act states in pertinent part:

> An employee, former employee, or prospective employee of the State who is aggrieved by the State's violation of the Age Discrimination Employment Act of 1967, United States Code, Title 29, § 621, et seq., as amended, may bring a civil action against the State and any Court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of the Act.

2001 Minn. Laws ch. 159 (to be codified at Minn. Stat. § 1.05), a copy of which is attached as Exhibit B.

This Act took effect on August 1, 2001. See Minn. Stat. § 645.02. Because the Act does not clearly and manifestly express a retroactive intent, it most likely does not apply retroactively. See Minn. Stat. § 645.21. Accordingly, the Act does not affect any existing determinations of discrimination and charges, nor does it affect collective bargaining agreements currently in place.

B. Federal.

United States Representatives from Wisconsin and Minnesota have introduced a Bill for consideration entitled the "Teacher Voluntary Early Retirement Incentive Act of 2001." See Exhibit C (copy of H.R. 2558). The Bill provides that supplemental benefits provided by a school

© 2001 Shamus P. O'Meara and Mark R. Azman

district pursuant to a voluntary early retirement incentive plan does not violate the ADEA under certain predetermined circumstances (e.g., benefits must be "supplemental", ERIP option must be truly voluntary, retiree must have six months to decide, must allow option for largest benefit available).

At this time, the Bill has been referred to the Committee on Education and the Workforce. This legislation is currently supported by the WASB, NSBA, NEA, WEAC, AFT, and AFL-CIO, but is opposed by AARP.

© 2001 Shamus P. O'Meara and Mark R. Azman

CURRENT EEOC ENFORCEMENT POSTURE

In April 2001, the United States District Court for the Western District of Pennsylvania issued its decision in Erie County Retirees Association v. County of Erie, 140 F.Supp.2d 466 (W.D. Penn. 2001) ("Erie II"). See Exhibit D. This decision has prompted the EEOC to reconsider its existing position on several issues, including age discrimination charges based upon health insurance retirement plans

A. The *Erie County Retirees Association v. County of Erie* decision.

In Erie County, Plaintiffs, retirees of the County of Erie ("County") aged 65 and older and receiving health care coverage from the County, sued the County alleging violations of the ADEA and various state laws by requiring plaintiffs to accept coverage under a certain health plans while simultaneously offering younger retirees purportedly superior health care coverage. During the first round of summary judgment motions (concerning only the ADEA claim), the Court held that the ADEA did not provide relief "in the context of alleged discrepancies and health benefits offered by employers to retirees," and dismissed the ADEA claim. Erie County Retirees Assn v. County of Erie, 91 F.Supp.2d 860 (W.D.Penn. 1999) ("Erie I").

On appeal, the Third Circuit Court of Appeals reversed, concluding "that the County has treated appellants differently that other retirees with respect to their 'compensation, terms, conditions, or privileges of employment, because of . . . age.' Accordingly, [the retirees] have established a claim of age discrimination under 29 U.S.C. § 623(a)(1), unless any of the ADEA's 'safe harbors' is applicable." Erie County's Retirees Assoc. v. County of Erie, 220 F.3d 193, 213 (3rd Cir. 2000). The Third Circuit remanded, directing the District Court to allow the County the

© 2001 Shamus P. O'Meara and Mark R. Azman

opportunity to establish entitlement to a "safe harbor"[11] under 29 U.S.C. § 623f(2)(B)(i).

In remanding the case to the District Court, the Third Circuit provided the following instruction on the application of the equal benefit and equal cost standard:

> In accordance with 29 C.F.R. § 1625.10(e), the "Equal Benefit" prong of the analysis should take into account equally both the Medicare-provided in the County-provided benefits which members of the plaintiff class received. If the County cannot satisfy the "Equal Benefit" prong, the [District] Court should then turn to the "Equal Cost" inquiry. The County argues that in applying the "Equal Cost" analysis, the Court should consider the costs which Medicare incurs on behalf of persons in SecurityBlue as well as the costs which the County itself incurs . . . clearly, the purpose of the Equal Benefit or Equal Cost standard is to encourage employers to spend equally on benefits for older and younger persons . . . accordingly, the District Court should consider only those costs which the County itself incurs.

Erie County, 220 F.3d at 216. As the Erie II Court explained, "[p]ut more simply, a benefit plan is ADEA compliant if it either provides equal benefits to employees or is of equal cost to an employer." 140 F.Supp.2d at 470.

On remand, which is the subject of Erie II, the District Court found that the County was not entitled to invoke the safe harbor of either "equal benefit" or "equal cost" as provided in the ADEA. See Erie II, at 467-68. The two standards are discussed as follows.

Equal Benefit. The Court analyzed the health plan offered to the plaintiff-retirees with the health plans offered to younger retirees, and concluded that the plaintiff-retirees had received a "lesser benefit" based upon higher premium payments paid by the retirees. The County, thus, failed to satisfy the equal benefit standard.

---

[11] Under either the equal benefit or equal cost standard.

Equal Cost. Because the Plaintiff-retirees' health plan was less expensive for the County than the two other plans offered to younger retirees, the Court held that the County failed to satisfy the equal cost standard.

B. Current EEOC Enforcement Posture.

The current EEOC efforts include easing off original charges and initiating attempts at conciliation which include simply eliminating the offending language for future agreements or simply abandoning enforcement efforts.[12]

On August 1, 2001, the EEOC's new general counsel (David Frank) conducted a comprehensive teleconference with numerous individuals from various offices at the EEOC, MSBAIT, the National League of Cities, National League of Counties, League of Minnesota Cities, Waterman Group, Wisconsin Association of School Boards and others involved with public employment. The EEOC had arranged the roundtable discussion to evaluate strategies to fashion a Safe Harbor under the ADEA that would allow public institutions (and all employers) to provide health insurance coverage to retirees that the EEOC views are violative of the ADEA as identified in Erie II.

Mr. Frank began the discussion by announcing that the EEOC's enforcement policy as it pertains to health insurance/medicare "bridge" plans was formally under review. He noted that a partial change in the enforcement of these plans, at least as it relates to school districts, was already being put into effect. Mr. Frank explained the EEOC would no longer be prosecuting charges relating to health plans but would continue prosecuting charges for plans that have a cash incentive for early employee retirement.

---

[12] As of July 11, 2001, the EEOC and Education Minnesota (on behalf of more than 300 local unions) signed a conciliation agreement in which the Unions agreed to revise ERIP language in their collective bargaining agreements and bring that language into compliance with the ADEA. The Unions also agreed to take all necessary steps to permit school districts with whom they have contracted to modify existing collective bargaining agreements until new ADEA-compliant agreements can be negotiated.

He also noted the EEOC had reviewed retirement plans that had both cash payments and health benefit components. For these plans, Mr. Frank advised that the EEOC would agree to enter into a conciliation arrangement by which the EEOC would no longer pursue the health insurance charge if the districts would agree to eliminate the cash benefit provision from its bargaining agreement.

Mr. Frank made a few different statements during the course of the teleconference relating to the EEOC's policy as it pertains to school districts. Because of the importance of the issue, the authors of these materials (as general counsel for MSBAIT) have written Mr. Frank asking that he provide a written delineation of the EEOC's specific enforcement policy affecting Minnesota School Districts. In this manner, we hope to gain a more specific understanding of the EEOC's role concerning the pending Charges in Minnesota as well as the EEOC's future position pertaining to the affected plans.

Much of the teleconference involved a comprehensive discussion of whether the EEOC could fashion a Safe Harbor under the ADEA. This would be done through its rulemaking power which would allow school districts, and other public and private employers, to continue providing health insurance benefits without threat that the plans would be held in violation of the ADEA as they were in Erie II.[13] With the stated goal to prevent employers from eliminating retiree health coverage, the EEOC is thus interested in pursuing a rulemaking fix that would allow employers to retain these plans without facing charges of discrimination.

The discussion then turned to how a Safe Harbor could be created that would satisfy the "Equal Benefits/Equal Cost" standard required for an ADEA exception. Ideas were discussed to use Medicare as a allowable contribution that would in turn create a satisfactory employer reduction in benefits when the retiree becomes Medicare eligible. Significant concerns were raised by the Wisconsin and Minnesota representatives that a large number of school districts now discontinue benefits at age 65. Thus, a fair amount of skepticism was voiced concerning whether requiring districts and other employers to pay benefits beyond 65 (even if it were a five year period after retirement) would provide enough incentive for employers to continue offering such voluntary plans.

Mr. Frank was asked whether the EEOC was insisting that employers pay past the age of 65 as a means to create a Safe Harbor. Mr. Frank reiterated that the EEOC's goal was to prevent employers from dropping the retirees from their health coverage, and with that goal in mind, all options were on the table, including a resolution that would allow the benefits to end when retirees become Medicare eligible.[14]

---

[13] Mr. Frank was asked directly why the EEOC was so concerned about a court decision that agreed with longstanding EEOC policy that such plans did not comport with the ADEA. Mr. Frank was quite candid in responding that he sees a rather chilling effect by the decision; employers discontinuing these voluntary benefits as a means to avoid violating the ADEA and involving themselves in litigation.

According to Mr. Frank, a number of national organizations, including AARP and the NEA, have already met with the EEOC to discuss the Safe Harbor issue. The NEA apparently takes the position that all problems associated with early retirement incentive plans, including the cash payment issue, would need to be addressed through EEOC rulemaking in order to garner NEA support. The AARP, according to Mr. Frank, recognizes that something needs to be done with regard to creating a Safe Harbor but evidently insists that prescription drug payments be mandated as part of any employer requirement before the AARP would provide any support.

In sum, the EEOC's general counsel explained that he has taken a personal role in reviewing and partially changing the EEOC's enforcement of retirement plans. In terms of the EEOC creating a Safe Harbor for school districts to continue providing these plans, the devil is in the details. These are extremely complicated issues involving all areas of the country. Issues such as whether employers would be required to contribute past the age of 65 and, if so, how much to contribute is of critical importance. This will have to be evaluated with hard data throughout the country where the provision of Medicare-type benefits changes depending on the state in which the benefits are received.

---

[14] The creation of a Safe Harbor, according to Mr. Frank, would also have the effect of eliminating an individual's right to bring a claim under the ADEA against an employer who provided such plans. Although he admitted that creating such a Safe Harbor was not going to be easy and would take some time, he felt this was the only constitutional means by which an individual's rights could be foreclosed. Mr. Frank explained that even H.R. 2558 introduced in Congress by the Wisconsin and Minnesota delegations amending the ADEA to allow the use of voluntary early retirement incentive plans by educational agencies would not preclude any individual's claim. He explained that serious constitutional due process concerns in a form of creating an *ex post facto* law would raise significant opposition in Congress and, in his view, would not be legal even if it was passed into law.

C. August 22, 2001 Letter from David Frank, Legal Counsel for EEOC.

In correspondence dated August 22, 2001, Mr. Frank indicated that the EEOC would not initiate or pursue ADEA charges until a new EEOC policy is in place with respect to declining retiree health benefit plans. The EEOC, however, will continue to vigorously pursue other types of age discrimination claims by retirees, such as severance payments, stipends, or cash payments that are reduced or eliminated on the basis of age.

Mr. Frank advised that on August 20, 2001, the EEOC also announced officially that it is reviewing its policy regarding the ADEA's application to retiree health benefit plans and has rescinded its previous guidance on the subject.

A copy of Mr. Frank's letter and attachments are attached hereto.

BIBLIOGRAPHY

Robert Knowles, Starbucks and the New Federalism: the Court's Answer to Globalization, 95 Nw. U. L. Rev. 735 (2001).

Cristian M. Stevens, Revolutionary or Aberrational?: The Status of the Supreme Court's Recent Federalism Cases in the Eighth Circuit, 44 ST. LOUIS U. L.J. 529 (2000)

Mary Bomgren, The Eleventh Amendment and the Threat to the Americans with Disabilities Act, 79 MICH. B.J. 1670 (2000)

Age Discrimination: Past, Present, Prologue, 36 TRIAL 54 (Dec. 2000)

Robert C. Post and Reva B. Siegel, Equal Protection by Law: Federal Antidiscrimination Legislation after Morrison and Kimel, 110 YALE L.J. 441 (2000)

Federal Environmental Law in the "New" Federalism Era, 30 ENVTL. L.REP. 11122 (2000)

Commentary, The Eleventh Amendment, Sovereign Immunity and its Impact on School Districts, 147 EDUC. L.REP. 15 (2000)

David C. Feola, David R. Fine, The "New Federalism": Ignore it at Your Peril, COLORADO LAWYER 5 (Nov. 2000)

Julie Goldscheid, United States v. Morrison and the Civil Rights Remedy of the Violence Against Women Act: a Civil Rights Law Struck down in the Name of Federalism, 86 CORNELL L. REV. 109 (2000)

The Supreme Court 1999 Term, 114 HARV. L. REV. 179 (2000)

Peter J. Rubin, Reconnecting Doctrine and Purpose: a Comprehensive Approach to Strict Scrutiny after Adarand and Shaw, 149 U. PA. L. REV. 1 (2000)

Federal Environmental Regulation in a Post-Lopez World: Some Questions And Answers 30 ENVTL. L.REP 10980 (Nov. 2000)

Commentary, The Education Lawyer's Guide to the Sovereign Immunity Revolution, 146 ED. LAW REP. 951.

© 2001 Shamus P. O'Meara and Mark R. Azman

DISCLAIMER

The information contained herein does not constitute legal advice or establish an attorney/client relationship. If you would like more information about the subject matter herein, please contact one of the authors.

© 2001 Shamus P. O'Meara and Mark R. Azman

Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
THIRD DIVISION

The Minnesota School Boards Association Insurance Trust, and Independent School District 94, Cloquet, Plaintiffs,	)	Court File No. 2042 RHK/RLE
v.	)	SECOND AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND JURY TRIAL DEMAND
The United States Equal Employment Opportunity Commission, Education Minnesota, and Education Minnesota - Cloquet, Defendants.	)	

Plaintiffs, The Minnesota School Boards Association Insurance Trust ("MSBAIT") and Independent School District 94, Cloquet ("ISD 94"), for their Second Amended Causes of Action, state and allege as follows:

INTRODUCTION

1. Plaintiffs MSBAIT and ISD 94 bring this action pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201, et seq.,the Administrative Procedure Act, 5 U.S.C. §§ 700, et seq., and the Constitution of the United States, to seek the Court's declaration as to MSBAIT and its School District Plan Participants', including ISD 94's, (the "Participants"), rights and legal relations with the Defendants as follows:

A. That the Participants are arms of the state of Minnesota and, therefore, possess immunity under the Eleventh Amendment to the Constitution of the United States ("Eleventh Amendment") against private lawsuits asserted under the Federal Age Discrimination in

Employment Act of 1967, 29 U.S.C. § 621, et seq., as amended (ADEA) arising from the Participants' retirement, health, severance and insurance plans (the "Plans");

B. That the ADEA may not constitutionally be applied to state or local governments because in enacting the legislation, Congress exceeded its power under the Commerce Clause, Article I, Section 8, Clause 3, of the Constitution of the United States ("Commerce Clause"), the Fourteenth Amendment to the Constitution of the United States ("Fourteenth Amendment"), the Tenth Amendment to the Constitution of the United States ("Tenth Amendment"), the principles of state sovereignty and federalism, United States Supreme Court case law and constitutional jurisprudence. Therefore, the ADEA cannot be applied to the Participants, nor can The United States Equal Employment Opportunity Commission ("EEOC") enforce such invalid legislation against the Participants, including Plaintiff ISD 94;

C. In the alternative, that the Participants' Plans comply with the ADEA; and

D. If the Participants' Plans do not comply with the ADEA, that Defendants Education Minnesota, and Education Minnesota - Cloquet, are bound by this Court's determinations.

E. Plaintiffs also seek injunctive relief to prohibit the EEOC from commencing any lawsuit against any Participant which seeks to determine that any of the Plans violate the ADEA.

PARTIES AND RELATED ENTITIES

2. MSBAIT is a non-profit corporation incorporated in the State of Minnesota, with its principal place of business in St. Peter, Minnesota. MSBAIT is authorized by Minnesota Statutes to engage in self-insurance on behalf of its Participants. A vast majority of School Districts in Minnesota are Participants in MSBAIT's self-insurance pool, The Minnesota School Boards Association Insurance Trust Group Self-Insured Property and Casualty Plan ("Trust Plan").

The Trust Plan is funded by the Participants, each of which provides for the education of citizens of Minnesota, and each of which is an arm of the State. Certain Participants have submitted claims under the Trust Plan in relation to charges filed by the EEOC against the Participants claiming that the Participants' retirement, health, severance and insurance plans violate the ADEA (hereinafter referred to as "The EEOC Claims"), such that, if indemnification obligations exist under the Trust Plan, all Participants will be financially impacted by The EEOC Claims.

3. Plaintiff ISD 94 is an Independent School District and public corporation created pursuant to Minnesota law. ISD 94 provides for the education of citizens of Minnesota, and is an arm of the State.

4. Defendant EEOC is an agency of the United States Government charged with the enforcement of the ADEA, 29 U.S.C. § 626.

5. Defendant Education Minnesota is a labor organization which, along with its local affiliates, represented the Participants' teachers in collective bargaining with the Participants which lead to the adoption of the Plans at issue in this action. Education Minnesota is named as a Defendant because of its role in negotiating the provisions of the Plans which the EEOC now claims are discriminatory, and because it represents the interests of the beneficiaries of the Plans. The declaratory relief sought will affect Education Minnesota's rights and legal relations with the Plaintiffs and Defendant EEOC.

6. Defendant Education Minnesota - Cloquet, is a labor organization which is the local affiliate of Defendant Education Minnesota for ISD 94. Defendant Education Minnesota - Cloquet represented ISD 94's employee teachers in collective bargaining with ISD 94 which lead to the adoption of one of the Plans at issue in this action (the "ISD 94 Plan"), and was a signatory to the

ISD 94 Plan. Education Minnesota - Cloquet is named as a Defendant because of its role in negotiating the provisions of the ISD 94 Plan to which the EEOC now claims is discriminatory, and because it represents the interests of the beneficiaries of the ISD 94 Plan. The declaratory relief sought will affect Education Minnesota - Cloquet's rights and legal relations with the Plaintiffs and Defendant EEOC.

JURISDICTION AND VENUE

7. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 as the issues raised are Federal Questions arising under the Commerce Clause, Tenth, Eleventh and Fourteenth Amendments to the Constitution of the United States and the Age Discrimination in Employment Act of 1967, § 2, et seq., 29 U.S.C. § 621, et seq., as amended. This Court also has jurisdiction over this action under 28 U.S.C. § 1346 (a)(2) because it involves an action against the United States as a defendant and is founded upon the Constitution and an Act of Congress. This Court also has jurisdiction over this action pursuant to the Administrative Procedure Act, 5 U.S.C. § 702, as Plaintiffs seek a declaration of the propriety of the EEOC's enforcement actions against the Participants and whether the EEOC exceeded the statutory authority proscribed to it by the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 626, as amended, as further described herein. To the extent supplemental issues are raised by this Complaint, this Court has jurisdiction over such issues pursuant to 28 U.S.C. § 1667.

8. Venue pursuant to 28 U.S.C. § 1391 is proper because a substantial part of the events giving rise to this action occurred in this District in that the Plans were collectively bargained-for, and administered, in the State of Minnesota, and because Defendants Education Minnesota and Education Minnesota - Cloquet reside, may be found, or maintain their principal

offices within the District, and because an agency of the United States or the United States is a defendant. Venue is also appropriate under 28 U.S.C. § 1402 (a)(1).

GENERAL ALLEGATIONS

MSBAIT Participants are Arms of the State of Minnesota

9. Minn. Const. Art. XIII, § 1 mandates a fundamental right to public education in Minnesota by compelling the Minnesota Legislature to establish a general, uniform, thorough and efficient system of public schools through taxation or other public funding.

10. Minnesota School Districts, including the Participants, are public entities created for public purposes; the School Districts' corporate powers are exercised for the public function of education, and each are therefore arms of the State of Minnesota.

11. Minnesota School Districts, including the Participants, are financed predominately by State of Minnesota funding.

12. Funds to the Participants by the State of Minnesota are pooled with other Participants' contributions to MSBAIT for use in the payment of claims covered under MSBAIT's Trust Plan. If claims related to The EEOC Claims are covered by the Trust Plan, funds utilized to pay The EEOC Claims will have been derived from the State Treasury.

History of Early Retirement Incentive/Severance Pay Provisions

13. On information and belief, in the early 1970s, the Minnesota Legislature authorized Minnesota School Districts to provide severance pay to School District teachers, and to establish, prescribe and promulgate provisions, rules and regulations for the payment of severance pay upon leaving employment prior to a teacher's normal retirement date.

14. On information and belief, since the 1970s, teachers' unions have proposed

severance pay or early retirement incentive pay provisions in Minnesota School District contracts and Plans.

15. On information and belief, the rationale provided for the proposed severance pay or early retirement incentive pay provisions in School District contracts and Plans was long-term cost savings to the School Districts.

16. Thereafter, the Minnesota Legislature authorized School Districts to establish early retirement incentive and severance plans.

17. School District rationale for the severance and early retirement incentive pay plans continues to be long-term cost savings to the School Districts.

18. The Minnesota Supreme Court in State by Beaulieu v. Independent School District No. 624, 533 N.W.2d 393 (Minn. 1995) held that voluntary declining scale early retirement incentive pay provisions do not unlawfully discriminate based on age under Minnesota Law.

19. The ISD 94 Plan is attached to this Complaint as Exhibit 1.

20. Attached to this Complaint as Exhibits 2 and 3 are plans collectively bargained-for from Independent School District 118 (Remer/Longville) and Independent School District 181 (Brainerd).

EEOC Allegations That The Plans Violate the ADEA

21. During the past year the EEOC began issuing form letters to the Participants purporting to determine the compliance status of each Participant with the ADEA in relation to certain provisions in the Participants' Plans.

22. In these form letters, EEOC charged the Participants with violations of the ADEA, and sought information and responses to questionnaires from the Participants. On information and

belief, the EEOC utilized the information and questionnaire responses to determine if the Participants' Plans had complied with the ADEA.

23. Subsequent to sending these initial form letters, EEOC issued Letters of Determination to the vast majority of Participants which provided a "determination on the merits of this charge" of ADEA violations; the EEOC uniformly, and generally in a form letter, "found" the Plans to be discriminatory under the ADEA.

24. The EEOC has sought certain relief, as well as alterations in the purportedly discriminatory aspects of the Plans from the Participants through informal methods of conciliation, conference and persuasion; however, on information and belief, the EEOC has not altered any of its determinations that the Participants have violated the ADEA.

25. At least one Participant, Plaintiff ISD 94, has rejected the informal methods of conciliation, conference and persuasion.

26. On August 31, 2000, the EEOC issued a notice to Plaintiff ISD 94 that conciliation efforts would be futile or non-productive and that the case was being forwarded for possible litigation; further, at other times material, the EEOC has issued similar notices to other Participants.

27. That since conciliation efforts have failed, the EEOC, or any other party aggrieved by the subject matter of the EEOC Claims, now has the right to commence litigation against Plaintiff ISD 94, or other Participants to whom notice has been provided, to purportedly enforce their rights under the ADEA.

28. That since the EEOC has concluded that Plaintiff ISD 94's plans, and the Participant's Plans are in violation of the ADEA, Plaintiff ISD 94, and the Participants are faced

with not only the likelihood of multiple lawsuits and potentially inconsistent adjudications, but also with serious labor disputes over the viability of current Plans and the ability to renegotiate with the collective bargaining units in light of the EEOC's determination.

COUNT I

THE ADEA IS UNCONSTITUTIONAL WHEN APPLIED TO THE PARTICIPANTS AND THE EEOC HAS NO AUTHORITY TO ENFORCE INVALID LEGISLATION AGAINST THE PARTICIPANTS.

29. The Plaintiffs incorporate herein Paragraphs 1 through 28 as though fully set forth in this Count.

30. That the ADEA may not be constitutionally applied to state or local governments since it is legislation that exceeds Congress' power under the Commerce Clause, the Tenth Amendment, the Fourteenth Amendment, the principles of state sovereignty and federalism, United States Supreme Court caselaw and constitutional jurisprudence.

31. The ADEA cannot be applied to the Participants nor can the EEOC enforce such invalid legislation against the Participants.

32. An actual controversy exists between Plaintiff MSBAIT on behalf of its Participants, including Plaintiff ISD 94 individually, and the Defendant EEOC as to whether the ADEA may be constitutionally applied to the Participants, and as to whether the EEOC may enforce invalid legislation against the Participants.

33. That Plaintiff MSBAIT on behalf of the Participants, including Plaintiff ISD 94, and Plaintiff ISD 94, individually, are entitled to a declaration that the ADEA may not be constitutionally applied to the Participants, and the EEOC has no authority to enforce the ADEA against the Participants.

COUNT II

DECLARATION THAT THE PARTICIPANTS ARE IMMUNE FROM PRIVATE SUITS UNDER THE ELEVENTH AMENDMENT.

34. The Plaintiffs incorporate herein Paragraphs 1 through 33 as though fully set forth in this Count.

35. The Participants are arms of the State and, therefore, entitled to Eleventh Amendment immunity for any private lawsuits under the ADEA arising from the Plans.

36. An actual controversy exists between Plaintiff MSBAIT on behalf of the Participants, including Plaintiff ISD 94 individually, and Defendants Education Minnesota, and Education Minnesota - Cloquet, in their respective representative capacity of the Plan beneficiaries, as to whether the Participants, including ISD 94 individually, are immune from liability under the Eleventh Amendment to the Constitution of the United States for private lawsuits under the ADEA arising from the Plans.

37. That Plaintiff MSBAIT on behalf of its Participants, including Plaintiff ISD 94, and Plaintiff ISD 94, individually, are entitled to a declaration that the Participants are immune under the Eleventh Amendment from private suits under the ADEA arising from the Plans.

COUNT III

ALTERNATIVE DECLARATORY RELIEF: DECLARATION THAT THE PLANS COMPLY WITH THE ADEA

38. The Plaintiffs incorporate herein Paragraphs 1 through 37 as though fully set forth in this Count.

39. The ISD Plans are representative of the Participants' Plans which have been cited by the EEOC as allegedly violating the ADEA.

40. The ISD 94 Plan has been cited by the EEOC as allegedly violating the ADEA.

41. Plaintiffs allege the Participants' Plans, including the ISD 94 Plan, comply with the ADEA.

42. An actual controversy exists between Plaintiff MSBAIT on behalf of the Participants, including Plaintiff ISD 94 individually, and the Defendants as to whether the Participants' Plans, including the ISD 94 Plan, comply with the ADEA.

43. If the Court determines that the Participants are not immune under the Eleventh Amendment from private lawsuits under the ADEA arising from the Plans, and/or if the Court determines that the ADEA may be constitutionally applied to the Participants, then Plaintiffs are entitled to a declaration that the Participants' Plans, including the ISD 94 Plan, comply with the ADEA.

COUNT IV

INJUNCTIVE RELIEF: EEOC PROHIBITED FROM BRINGING A LAWSUIT AGAINST ANY PARTICIPANT FOR VIOLATIONS OF THE ADEA

44. The Plaintiffs incorporate herein Paragraphs 1 through 43 as though fully set forth in this Count.

45. As plead in Count II above, the EEOC has no right or authority to enforce invalid legislation against Plaintiff ISD 94 and the Participants, and the Plaintiffs further allege the EEOC should not be permitted to further pursue or otherwise attempt to enforce the ADEA in relation to the Plans at issue in this action because the ADEA may not be constitutionally applied to Plaintiff ISD 94 and the Participants.

46. Because the EEOC may not enforce the ADEA against the Participants, including ISD 94, Plaintiff MSBAIT on behalf of the Participants, including Plaintiff ISD 94 individually, are entitled to an Order permanently enjoining the EEOC from commencing any lawsuit against any of the Participants, including ISD 94, for any alleged violations of the ADEA in relation to any of the Plans.

COUNT V

LEGAL EFFECT OF COURT'S RULINGS UPON DEFENDANTS EDUCATION MINNESOTA AND EDUCATION MINNESOTA - CLOQUET

47. The Plaintiffs incorporate herein Paragraphs 1 through 46 as though fully set forth in this Count.

48. Defendant Education Minnesota and its affiliated labor union locals, including Defendant Education Minnesota - Cloquet, were the Plans' collective bargaining negotiators on behalf of the teachers whom the EEOC now claims are discriminated against by the Plans.

49. Because of Defendant Education Minnesota's and Defendant Education Minnesota - Cloquet's status as unions involved in the collective bargaining process, these Defendants face potential liability if the Court alternatively determines the Plans do not comply with the ADEA.

50. Because the EEOC has already issued Determinations that some of the Plans violate the ADEA, an actual controversy exists between Plaintiffs and Defendants Education Minnesota and Education Minnesota - Cloquet as to whether the Participants, or Defendants Education Minnesota and Education Minnesota - Cloquet, may be liable for the ADEA violations if it is found that the Participants are not immune under the Eleventh Amendment from private lawsuits under the ADEA arising from the Plans, or if the Court determines the ADEA may be constitutionally applied to the Participants, and if it is further determined that the Plans violate the ADEA.

51. If the Court determines that the ADEA may be constitutionally applied to the Participants, including Plaintiff ISD 94, by the EEOC, and if the Court determines that the Participants are not immune under the Eleventh Amendment from private lawsuits under the

ADEA arising from the Plans, then Plaintiffs are entitled to a determination that Defendants Education Minnesota and Education Minnesota - Cloquet are bound by this Court's determinations on all issues raised in this action.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for the following relief from this Court:

1) Pursuant to the Commerce Clause, the Tenth Amendment, the Fourteenth Amendment, principles of state sovereignty and federalism, United States Supreme Court caselaw and constitutional jurisprudence, a Declaration that the ADEA may not be constitutionally applied, and the EEOC may not enforce the ADEA, against the Participants, including Plaintiff ISD 94;

2) A Declaration that the Participants, including ISD 94, are immune under the Eleventh Amendment to the Constitution of the United States from private lawsuits for ADEA claims arising from the Plans;

3) In the alternative, Plaintiffs seek a Declaration that the Plans comply with the ADEA;

4) A permanent injunction prohibiting the EEOC from commencing a lawsuit against any Participant based upon any assertion that the Participants' Plans violate the ADEA;

5) A Declaration that Defendants Education Minnesota and Education Minnesota - Cloquet are bound by this Court's determinations on all issues raised in this action;

6) For such other and further relief as is just, appropriate and equitable.

JOHNSON & CONDON, P.A.

Dated: ______________________ By: ______________________________

Shamus P. O'Meara (#221454)
Dale O. Thornsjo (#162048)
Attorneys for Plaintiffs
Financial Plaza
7235 Ohms Lane
Minneapolis, MN 55439-2152
Telephone: (952) 831-6544
Direct Dial: (952) 806-0438

JURY TRIAL DEMAND

To the extent the issues raised in this action require factual resolution, Plaintiffs hereby request Trial by Jury.

JOHNSON & CONDON, P.A.

Dated: ______________________ By: ______________________________

Shamus P. O'Meara (#221454)
Dale O. Thornsjo (#162048)
Attorneys for Plaintiffs
Financial Plaza
7235 Ohms Lane
Minneapolis, MN 55439-2152
Telephone: (952) 831-6544
Direct Dial: (952) 806-0438

Exhibit B

CHAPTER 159-S.F.No. 1614

An act relating to civil law; providing for civil actions against the state under the federal Age Discrimination in Employment Act, the federal Fair Labor Standards Act, the federal Family and Medical Leave Act, and the federal Americans With Disabilities Act; proposing coding for new law in Minnesota Statutes, chapter 1.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:

Section 1. [1.05] [WAIVER OF IMMUNITY FOR VIOLATIONS OF CERTAIN FEDERAL STATUTES.]

Subdivision 1. [AGE DISCRIMINATION IN EMPLOYMENT ACT.] An employee, former employee, or prospective employee of the state who is aggrieved by the state's violation of the Age Discrimination in Employment Act of 1967, United States Code, title 29, section 621, et seq., as amended, may bring a civil action against the state in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of the act.

Subd. 2. [FAIR LABOR STANDARDS ACT.] An employee of the state who is aggrieved by the state's violation of the Fair Labor Standards Act of 1938, United States Code, title 29, section 201, et seq., as amended, may bring a civil action against the state in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of the act.

Subd. 3. [FAMILY AND MEDICAL LEAVE ACT.] An employee, former employee, or prospective employee of the state who is aggrieved by the state's violation of the Family and Medical Leave Act, United States Code, title 29, sections 2601 to 2654, as amended, may bring a civil action against the state in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of the act.

Subd. 4. [AMERICANS WITH DISABILITIES ACT.] An employee, former employee, or prospective employee of the state who is aggrieved by the state's violation of the Americans with Disabilities Act of 1990, United States Code, title 42, section 12101, as amended, may bring a civil action against the state in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of the act.

Presented to the governor May 18, 2001
Signed by the governor May 22, 2001, 10:25 a.m.

Exhibit C

107TH CONGRESS
1ST SESSION

H. R. 2558

To amend the Age Discrimination in Employment Act of 1967 with respect to voluntary early retirement benefits and medical benefits.

IN THE HOUSE OF REPRESENTATIVES

JULY 18,2001

Mr.PETRI (for himself,Mr.KIND,Mr.GREEN of Wisconsin,Mr.SENSENBRENNER,Mr.YAN of Wisconsin,Ms.BALDWIN,Mr.BARRETT of Wisconsin,Mr.KLECZKA,and Mr.PETERSON of Minnesota)introduced the following bill;which was referred to the Committee on Education and the Workforce

A BILL

To amend the Age Discrimination in Employment Act of 1967 with respect to voluntary early retirement benefits and medical benefits.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Teacher Voluntary Early Retirement Incentive Act of 2001 ”.

SEC. 2. GOVERNMENTAL AND HIGHER EDUCATION VOLUNTARY EARLY RETIREMENT INCENTIVE PLANS.

(a)AMENDMENT.—Section 4(m)of the Age Discrimination in Employment Act of 1967 (29 U.S.C.623)is amended to read as follows:

"(m)VOLUNTARY ETIREMENT INCENTIVE PLANS.—Notwithstanding subsection (f)(2)(b),it shall not be a violation of subsection (a),(b),(c),or (d)solely because a voluntary early retirement incentive plan maintained by a local educational agency (as defined in section 14101 of the Elementary and Secondary Education Act of 1965 (20 U.S.C.8801))or an institution of higher education (as defined in section 101 of the Higher Education Act of 1965 (20 U.S.C.1001)),provides for supplemental benefits to an employee that are reduced or eliminated on the basis of the employee 's age at the time of such employee 's retirement,if —

"(1)the employer does not implement with respect to such employee any age-based reduction or elimination of benefits that are not such supplemental benefits,except as permitted by other provisions of this Act;

"(2)such supplemental benefits are in addition to any retirement or severance benefits which have been offered generally to employees,independent of any early retirement or exit-incentive plan,within the preceding 365 days;and

"(3)with respect to any plan supplemental benefits for which an employee first becomes eligible after the enactment of Teacher Voluntary Early Retirement Incentive Act of 2001 —

"(i)any employee who attains the minimum age and satisfies all non-age based conditions for receiving a benefit under the plan has an opportunity lasting not less than 180 days to elect to retire,and the plan does not require retirement to occur sooner than 180 days after such election;and

"(ii)any employee who is not eligible to receive the maximum supplemental benefits provided under the plan because of the age of such employee at the time of retirement was afforded a reasonable opportunity to receive such maximum benefits at a previous time in such employee 's employment.".

(b)CONSTRUCTION.—Except as otherwise provided in section 4(m)(3)of the Age Discrimination in Employment Act of 1967 (29 U.S.C.623(m)(3)),the amendment made by subsection (a)shall apply in determining whether a voluntary employee early retirement incentive plan maintained by a local educational agency (as defined in section 14101 of the Elementary and Secondary Education Act of 1965 (20 U.S.C.8801))or an institution of higher education (as defined in section 101 of the Higher Education Act of 1965 (20 U.S.C.1001)),was in violation of subsection (a),(b),(c),or (e)of section 4 of the Age Discrimination in Employment Act of 1967 (29 U.S.C.621 et seq.) after January 1,1996.

SEC. 3. RETIREE MEDICAL BENEFITS COORDINATED WITH MEDICARE AND OTHER GOVERNMENTAL AND EMPLOYER BENEFIT PLANS; VOLUNTARY EARLY RETIREMENT INCENTIVE PLANS MAINTAINED BY LOCAL EDUCATIONAL AGENCIES.

(a)VOLUNTARY EARLY ETIREMENT INCENTIVE PLANS MAINTAINED BY LOCAL EDUCATIONAL AGENCIES.—Section 4(*l*)(1)of the Age Discrimination in Employment Act of 1967 (29 U.S.C.623(*l*)(1))is amended by adding at the end the following:

"A voluntary early retirement incentive plan maintained by a local educational agency (as defined in Section 14101 of the Elementary and Secondary Education Act of 1965 (20 U.S.C.8801))which makes payments or supplements as provided in clauses (i)or (ii)of subparagraph (B)in coordination with a defined benefit plan (as defined in

Section 3(35)of the Employee Retirement Income Security Act of 1974 (29 U.S.C.1002(35)maintained by a state or an agency thereof shall itself be deemed to constitute a defined benefit plan for purposes of subparagraph (B).”.

(b)ETIREE MEDICAL BENEFITS COORDINATED WITH MEDICARE BENEFITS.—Section 4(*l*)of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 623(*l*))is amended by adding to the end the following:

“(4)It shall not be a violation of subsection (a),(b), (c),or (e)solely because an employee benefit plan (as defined in section 3 of the Employment Retirement Income Security Act of 1974 (29 U.S.C.1002(3))provides for medical benefits for retired participants that are altered, reduced,or eliminated when the participant is eligible for medical benefits under title XVIII of the Social Security Act (42 U.S.C.1395 et seq.)or an employee benefit plan maintained by a State or an agency thereof.”.

(c)CONSTRUCTION.—(1)The amendments made by subsections (a)and (b)shall apply in determining whether a voluntary early retirement incentive plan maintained by a local educational agency (as defined in Section 14101 of the Elementary and Secondary Education Act (20 U.S.C.8801))or an employee benefit plan (as defined in Section 3 of the Employee Retirement Income Security

Act of 1974 (29 U.S.C.1002(3))providing medical benefits for retired participants,was in violation of subsection (a),(b),(c),or (e)of section 4 of the Age Discrimination in Employment Act of 1967 (29 U.S.C.623)at any time subsequent to January 1,1996.

(2)No inference may be drawn from the amendment made by subsection (a)as to whether a voluntary early retirement incentive plan maintained by a local educational agency constitutes,or at any time before or after the effective date of subsection (a)constituted,a defined benefit plan (as defined in Section 3(35)of the Employee Retirement Income Security Act of 1974 (29 U.S.C.1002(35))for any purpose,including section 4 of the Age Discrimination in Employment Act of 1967.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

August 22, 2001

Mr. Shamus P. O'Meara
General Counsel, Minnesota School Boards
Association Insurance Trust
Johnson & Condon, P.A.
7235 Ohms Lane
Minneapolis, MN 55439-2152

Dear Mr. O'Meara:

This responds to your letter dated August 6, 2001. Thank you for participating in the informal August 1, 2001 meeting with me, other EEOC staff, and representatives of other public sector entities. As I indicated at that meeting, EEOC is reviewing its policy regarding the application of the Age Discrimination in Employment Act (ADEA) to retiree health benefit plans that reduce or eliminate benefits when the retiree becomes eligible for Medicare, and will not initiate or pursue charges on this issue until a new policy is in place. However, the Commission will continue to vigorously pursue other types of age discrimination claims by retirees, such as severance payments, stipends, or cash payments that are reduced or eliminated on the basis of age.

On August 20, the Commission announced officially that it is reviewing its policy regarding the ADEA's application to retiree health benefit plans and has rescinded its previous guidance on the subject. A copy of the rescission Notice is attached for your information. I have also attached a copy of the press release that accompanied the rescission Notice. The press release explains the Commission's position with respect to this issue, and with respect to other types of age discrimination claims involving retirees. To help further clarify our position with respect to charges that involve both retiree health and declining cash benefit claims, copies of model letters that were sent last month to the relevant school districts and unions in Minnesota are also attached.

The Commission continues to welcome your organization's input as we begin to develop a new policy on this important issue. If you have questions or would like to discuss this matter further, please contact me at (202) 663-4637.

Sincerely,

David L. Frank

David L. Frank
Legal Counsel

Attachments

cc: Richard Anderson, Exec. Dir., Minnesota School Boards Assoc.

EEOC

DIRECTIVES TRANSMITTAL

Number
915.003

Date
08/20/01

1. SUBJECT: Rescission of Section IV (B) of EEOC Compliance Manual Chapter on "Employee Benefits" and deletion of example.

2. PURPOSE: This Notice rescinds Section IV (B) of the Compliance Manual Chapter on "Employee Benefits," October 3, 2000 regarding the Age Discrimination in Employment Act (ADEA) and health insurance. It also deletes a related Example regarding retiree health benefits found in Section II (B) of the same Compliance Manual Chapter.

3. EFFECTIVE DATE: Upon receipt.

4. EXPIRATION DATE: This Notice will remain in effect until superseded.

5. ORIGINATOR: Office of Legal Counsel.

6. INSTRUCTIONS: Remove Section IV (B) of EEOC Compliance Manual Chapter on "Employee Benefits," October 3, 2000, and replace it with this Notice. Delete retiree health benefits Example found in Section II (B) of the same Compliance Manual Chapter.

8/20/01
Date

Cari M. Dominguez
Cari M. Dominguez
Chair

DISTRIBUTION: CM Holders

REVISED EEOC FORM 106 (6/91) PREVIOUS EDITIONS OF THIS FORM ARE OBSOLETE AND MUST NOT BE USED

Rescission of Section IV (B) of EEOC Compliance Manual Chapter on "Employee Benefits" and Deletion of Example

The Commission wishes to study further the relationship between certain employer practices regarding the provision of retiree health benefits and the Age Discrimination in Employment Act (ADEA).[1] One such practice is the provision of retiree health benefits only until Medicare eligibility is attained. Another such practice is the reduction of retiree health benefits to Medicare-eligible retirees such that the total of the employer provided medical benefits and the retiree's Medicare benefits is less than the medical benefits that the retiree received before becoming Medicare eligible. Though it is clear that "Medicare carve-out" plans that simply deduct from the benefits provided to Medicare eligible retirees those benefits that Medicare provides do not violate the ADEA, additional review is needed to assess other types of retiree health plan practices.

To enable the Commission to conduct this assessment, it is withdrawing Section IV (B) of the EEOC Compliance Manual Chapter on "Employee Benefits." The Commission is also deleting the Example regarding retiree health benefits in Section II (B) of the Compliance Manual Chapter.[2]

---

[1] The Commission's position on employee health benefits remains unchanged. An employer must offer to *current employees* who are 65 or over -- that is, who are at or over the age of eligibility for Medicare benefits -- the same health benefits, under the same conditions, that it offers to any current employee under the age of 65.

[2] The text of the deleted Example reads:

> "Employer B provides health insurance for its retirees but eliminates that coverage once the retirees become eligible for old-age benefits under Medicare. Because eligibility for these Medicare benefits is tied to age, Employer B's plan treats retirees differently on the basis of age."

U.S. Equal Employment Opportunity Commission

NEWS

FOR IMMEDIATE RELEASE
Monday, Aug. 20, 2001

CONTACT: Reginald Welch
David Grinberg
(202) 663-4900
TTY: (202) 663-4494

EEOC RESCINDS GUIDANCE; WILL REVIEW POLICY ON RETIREE HEALTH PLANS

WASHINGTON – The U.S. Equal Employment Opportunity Commission (EEOC) announced today that it has begun a review of its policy concerning the application of the Age Discrimination in Employment Act (ADEA) to employer-sponsored retiree health benefit plans, such as those offering extended health care coverage in the form of a Medicare bridge (coverage until Medicare eligibility at age 65). That policy had provided that retiree health plans that are reduced or eliminated on the basis of age or Medicare-eligibility violate the ADEA.

The announcement came in the form of an official rescission of portions of the Commission's Compliance Manual Chapter on "Employee Benefits" that discuss the application of the ADEA to retiree health plans. The rescission was approved on August 17 by a unanimous vote of the Commission.

Explaining the decision to rescind and review the policy, the Commission's new Chair, Cari M. Dominguez, said: "The Commission has heard from a wide range of stakeholders – including employer, employee, and labor groups – expressing concerns about the impact of the now rescinded policy on the future of employer-sponsored retiree health benefits. The Commission shares these concerns, and our review will focus on the development of a new policy, consistent with the ADEA, that does not discourage employers from providing this valuable benefit."

Commission Vice Chair Paul M. Igasaki observed that the agency "must carefully craft a policy which protects the rights of older retirees but does not deter employers from providing health benefits to retirees in general."

The Commission will continue to vigorously pursue other types of age discrimination claims involving retirees, such as cash-based early retirement incentives that are reduced or eliminated with advancing age.

The full text of the rescission, as well as other information about the EEOC, is available on the agency's Web site at www.eeoc.gov.

In addition to the ADEA, which prohibits discrimination against workers age 40 and older, the EEOC enforces Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on race, sex, religion, color, or national origin; the Equal Pay Act of 1963; Title I of the Americans with Disabilities Act of 1990, which prohibits employment discrimination against individuals with disabilities; and portions of the Rehabilitation Act of 1973 that prohibit disability discrimination in federal employment.

# # #

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Milwaukee District Office

310 West Wisconsin Ave., Suite [illegible]
Milwaukee, WI 53203-22[illegible]
PH (414) 297-[illegible]
TDD (414) 297-[illegible]
FAX (414) 297-4133 [illegible]

[MINNESOTA SCHOOL DISTRICT LETTER]

DATE

EEOC
vs.
KEYBOARD(Enter Name of School)
Charge Number: **KEYBOARD(Enter Charge No.)**

KEYBOARD(Enter Name and Address)

Dear KEYBOARD(Enter Mr. or Ms. and R Rep's Last Name):

The Equal Employment Opportunity Commission (EEOC or Commission) is willing to conciliate the above-referenced charge if your school district agrees to come into compliance with the well-settled law relating to cash-based early retirement incentives. We would conciliate incentives that include, for example, severance, stipends, or cash payments for accrued but unused leave that are reduced or eliminated on the basis of age. Under this conciliation, the Commission will not seek a change to early retirement incentive plans that offer extended health care coverage (generally in the form of a Medicare bridge).

Also, enclosed you will find a copy of the conciliation agreement entered into by the Commission, Education Minnesota, and more than ____ of Education Minnesota's local affiliates. By signing this agreement, Education Minnesota and its local affiliates have agreed to revise language in their collective bargaining agreements concerning early retirement incentive benefits to bring them into compliance with the Age Discrimination in Employment Act (ADEA). Moreover, they have also agreed to take any and all steps necessary to permit those school districts with whom they have contracted to modify existing collective bargaining agreements (in accordance with the terms set forth in the Commission's conciliation proposal to your school district) until such time as a new, ADEA - compliant collective bargaining agreement can be implemented.

The Commission earlier provided written technical assistance to help facilitate your efforts to design early retirement incentives that are ADEA - compliant. If you require additional guidance, however, please feel free to contact Monty Johnson, Deputy Director, at (414) 297-1244.

Sincerely,

Chester Bailey,
Director

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Milwaukee District Office

310 West Wisconsin Ave., Suite [illegible]
Milwaukee, WI 53203-22[illegible]
PH (414) 297-[illegible]
TDD (414) 297-[illegible]
FAX (414) 297-4133 [illegible]

[EDUCATION MINNESOTA LETTER]

Harley Ogata, Esquire
Education Minnesota
41 Sherburne Ave.
St. Paul, Minnesota 55103-2196

Dear Mr. Ogata:

The Equal Employment Opportunity Commission (EEOC or Commission) is willing to conciliate the charges brought against a number of Education Minnesota local affiliates, and the school districts with whom they have contracted, if they come into compliance with the well-settled law relating to cash-based early retirement incentives. We would conciliate incentives that include, for example, severance, stipends, or cash payments for accrued but unused leave that are reduced or eliminated on the basis of age. Under this conciliation, the Commission will not seek a change to early retirement incentive plans' that offer extended health care coverage (generally in the form of a Medicare bridge).

The Commission earlier provided written technical assistance to help facilitate the efforts of Education Minnesota and its local affiliates to design early retirement incentives that comply with the Age Discrimination in Employment Act (ADEA). If you or your local affiliates require additional guidance, however, please feel free to contact Monty Johnson, Deputy Director, at (414) 297-1244.

Sincerely,

Chester Bailey,
Director

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Milwaukee District Office

310 West Wisconsin Ave., Suite 800
Milwaukee, WI 53203-2292
PH: (414) 297-1111
TDD: (414) 297-1115
FAX: (414) 297-4133/3146

[MINNESOTA UNION LETTER]

DATE

EEOC
vs.
KEYBOARD(**Enter Name of Union**)
Charge Number: KEYBOARD(**Enter Charge No.**)

KEYBOARD(**Enter Name and Address**)

Dear KEYBOARD(**Enter Mr. or Ms. and R Rep's Last Name**):

Enclosed is a copy of the signed Conciliation Agreement. Based on this agreement, the Equal Employment Opportunity Commission (EEOC or Commission) will stop processing the above-captioned charge.

Under the terms of this Conciliation Agreement, your organization has agreed to come into compliance with the well-settled law relating to cash-based early retirement incentives. Unlawful cash-based early retirement incentives may include, for example, severance, stipends, or cash payments for accrued but unused leave that are reduced or eliminated on the basis of age. Under this conciliation, the Commission will not seek a change to early retirement incentive plans that offer extended health care coverage (generally in the form of a Medicare bridge).

The Commission earlier provided written technical assistance to help facilitate your efforts to design early retirement incentives that comply with the Age Discrimination in Employment Act (ADEA). If you require additional guidance, please feel free to contact Monty Johnson, Deputy Director, at (414) 297-1244.

Sincerely,

Chester Bailey,
Director

·NSBA· News Release
NATIONAL SCHOOL BOARDS ASSOCIATION

EMBARGOED UNTIL
SEPTEMBER 25, 2001

CONTACT: MARC EGAN
703-838-6707

Poll Shows Vouchers Fail to Meet American's Expectations

Suggests the More People See How Voucher Programs Operate, the Less they Like Them

Alexandria, VA -- Voucher programs already in place in Cleveland, Milwaukee and Florida and those proposed elsewhere fall well short in meeting the clear expectations held by an overwhelming majority of Americans, according to a new NSBA / Zogby International poll.

The poll shows that a huge majority of those surveyed, up to 90 percent, say that private schools accepting vouchers must meet the same accountability standards as public schools. These include disclosing how they spend tax dollars; reporting student scores the same as the public schools do; having the same academic standards as public schools; and admitting any student who applies, regardless of abilities. Current voucher programs do not meet these requirements.

In addition, although the surveyed adults are split in their initial views about vouchers, with 48 percent opposing them and 48 percent holding a favorable opinion, many of those who say they support vouchers quickly change their minds. Nearly 40 percent *withdraw* their support if it results in a loss of tax dollars to the public schools, for example.

The poll also shows that 61 percent of all adults and 74 percent of African-Americans oppose vouchers for students who *already* attend private and religious schools. Current voucher programs and most proposals do allow existing private school students to claim vouchers.

"These findings offer more evidence that Americans do not support a policy in which tax dollars are transferred from public schools into private ones that offer no accountability to taxpayers," NSBA Executive Director Anne L. Bryant said. "By astounding proportions, Americans expect that if private schools receive vouchers they should have to meet basic standards of accountability and equality. Yet we know from existing voucher programs and proposals that such expectations go unmet. Put simply, the more that Americans see how voucher programs operate, the less they like them."

The poll also shows that very few Americans believe vouchers are a sound strategy for improving public schools. In fact, just 12 percent of all adults and only 5 percent of African-Americans choose vouchers as a way to most improve the public schools. Rather, they clearly prefer tax dollars be invested in strategies such as reducing class sizes and strengthening teacher quality. For example, African-Americans are more than 7 times as likely to choose smaller class sizes over vouchers as the way to improve public schools.

In addition, those African-Americans surveyed report an unfavorable view of vouchers, with 57 percent opposing them and only 41 percent favoring them.

"Support for vouchers is paper thin," Bryant said. "We have seen in recent years how dramatically voucher support evaporates when the public learns that vouchers drain money from the public schools. And the public refuses to send tax dollars to private and religious schools which are not required to adhere to the standards and safeguards required of our public schools. The overwhelming rejection of voucher proposals by voters in California, Michigan and other states proves this.

"And now new evidence from Cleveland reveals that only 21 percent of students using vouchers there had actually been in the public schools. The taxpayers have instead been subsidizing the tuition of students who already attended private schools, and our poll indicates that is enormously unpopular as well," Bryant said.

Additional information on the poll can be found online at NSBA's Voucher Strategy Center web site (www.nsba.org/novouchers). There you can access the executive summary and a complete list of questions and results.

Zogby International conducted the nationwide poll in telephone interviews with 1,211 adults, which included 1,086 likely voters, and an oversample of 301 African-Americans from May 23-30, 2001. The margin of error for adults and likely voters is +/- 3 percent. The margin of error for the African-American oversample is +/- 5.7 percent.

###

·NSBA·

74

NSBA/Zogby International Poll
School Vouchers: What the Public Thinks and Why
Executive Summary

NSBA contracted with Zogby International to conduct a 25-question poll of nationwide opinion on school vouchers. Zogby interviewed 1,211 adults, which included 1,086 likely voters, and an oversample of 301 African-Americans from May 23-30, 2001. The margin of error for adults and likely voters is +/- 3 percent. The margin of error for the African-American oversample is +/- 5.7 percent.

This poll reveals that few Americans believe vouchers are the way to most improve public schools, but rather, they prefer investing in strategies such as smaller classes and strengthening teacher quality. Nonetheless, *at first glance*, the public seems split in its overall opinion of school vouchers, with many Americans yet to have reached solid decisions on the topic. But upon closer inspection, the poll suggests that the more people know about how voucher programs operate, the less they like them, and most importantly, Americans' expectations of a voucher program sharply contrast with existing programs and proposals. For example, many Americans withdraw support if it means the public schools lose tax dollars. And the poll clearly shows that Americans overwhelmingly expect public accountability of any private or religious school receiving public dollars.

Adults, and African-Americans especially, clearly prefer tax dollars be spent on reducing class sizes, improving teacher quality and adding training for teachers and principals instead of giving parents school vouchers. A mere 12 percent of adults and only 5 percent of African-Americans choose vouchers as the best way to improve public schools. African-Americans are 7 times more likely to pick smaller class sizes as the best strategy. The poll makes clear that vouchers are not seen by those who support them as a way to improve public schools but rather to create choices for parents.

Although the public initially splits in its overall opinion of vouchers, with 48 percent indicating they oppose vouchers and 48 percent indicating they favor them, the support is weak. For example, only half of the supporters (and 24 percent of all adults) indicate they "strongly favor" vouchers. In contrast, two-thirds of those opposed to vouchers (and 32 percent of all adults) say they "strongly oppose" them. Voters, in general, are slightly more opposed, and African-Americans show clear opposition. Fifty-seven (57) percent of African-Americans say they oppose vouchers, including 41 percent who "strongly oppose" vouchers.

The poll also reveals that voucher support fades when certain consequences are posed. For example, even among voucher supporters, 40 percent withdraw their support if it means a loss of tax dollars to the public schools. African-Americans indicate even more concern about the potential negative financial impact on public schools.

The most distinct finding is that an overwhelming majority of adults, voters and African-Americans expect private and religious schools that accept vouchers to meet several basic accountability standards. These measures include public disclosure of their spending of tax dollars, testing their students and publicly reporting the results, following state academic standards, and admitting all students regardless of abilities. Support for these measures reaches 90 percent among adults and African-Americans, and upwards of 87 percent among even those who "strongly favor" vouchers.

Finally, the poll suggests that existing voucher programs and proposals run counter to what most Americans expect. There is clear opposition (61 percent) to allowing existing private school students to receive vouchers, and for programs targeted exclusively for low-income students, those in urban public schools and those in low-performing public schools. Rather, the public seems to believe that if there is ever to be a taxpayer-supported voucher program, it ought to provide the same guarantees and safeguards for students and taxpayers as the public schools. That is, in addition to meeting basic accountability measures, the private schools ought to be open to any public school student, regardless of family income. To date, voucher programs have not met those expectations.

Overall, the poll indicates that vouchers do not have a groundswell of support, but there is clear consensus that if private and religious schools ever do receive taxpayer-funded vouchers, they should be held to many of the same requirements as the public schools.

Key Findings and What They Mean

an NSBA Analysis

1) **Among those with strong opinions, a majority opposes vouchers, but many Americans do not yet have strong opinions on the topic.**
While 48 percent of Americans indicate opposition to vouchers and 48 percent indicate support for vouchers, the number who *firmly* oppose vouchers clearly exceeds those who *firmly* support them. Among all adults, 32 percent "strongly oppose" vouchers, while just 24 percent "strongly favor" vouchers. For a sizable number of Americans (40 percent combined) their opposition or support can fairly be classified as "soft," since they indicated they only *somewhat* support or oppose vouchers.

What it Means…
The burden of convincing the public that vouchers are worth trying rests squarely with voucher advocates. The poll indicates they still have a long way to go since only 24 percent of adults say they *strongly* favor vouchers. The fact that 40 percent of the public say they only *somewhat* oppose or favor vouchers indicates that many Americans still do not know enough about the issue to have formed hardened opinions. This point also favors voucher opponents since history shows that the more the public learns about vouchers and their consequences, the *less* they like them. Voters have made that abundantly clear by overwhelmingly rejecting school vouchers every time the issue has been placed on the ballot.

2) **Few Americans support vouchers if it means a loss of tax dollars to the public schools.** Nearly 40 percent of adults who initially say they *support* the idea of vouchers, change their minds if it means the public schools will lose tax dollars. Among African-Americans who initially support vouchers, 57 percent withdraw their support if public schools lose money. When combined with those adults who *initially* said they opposed vouchers (48 percent), the poll makes it clear that the voucher movement is plagued by a small base of support.

What it Means...
This continues to be one of the Achilles' Heels of vouchers. Put simply, few Americans support a policy in which tax dollars are transferred out of the public schools and into private schools. Americans understand that draining the public schools of public money only limits their ability to make ongoing improvements, and therefore shortchanges too many students. Existing programs make it clear that vouchers do drain money from the public schools. The Milwaukee program cost state taxpayers $49 million last year and actually resulted in 237 Wisconsin school districts (plus Milwaukee) losing tax dollars, while the Cleveland program cost $13.9 million that otherwise would have been spent educating disadvantaged public school students.

3) **African-Americans clearly oppose vouchers, and even the minority who indicate support do so with qualifications.**
The oversample of African-Americans finds that 57 percent oppose vouchers, including 41 percent who "strongly oppose" them. However, the poll suggests that a generational divide exists. Although older African-Americans staunchly oppose vouchers, 57 percent of African-Americans who have children under the age of 17 support vouchers *at first glance*. However, as is the case with African-Americans overall, more than half of those (55 percent) who have children *withdraw* their support if it means the public schools lose tax dollars.

What it Means...
Older African-Americans, who are more likely to vote than younger African-Americans, clearly disapprove of school vouchers. And, although younger African-Americans with children show some support for the idea, that support is tempered by their concerns that the public schools will lose money and be harmed. Although voucher advocates have made a recent push to sway African-American opinion, many African-Americans remain opposed and skeptical.

4) **The public sees other reform strategies, not vouchers, as more promising ways to improve public schools.**
When asked to choose from among several ways to most improve public schools, only 12 percent of adults choose vouchers. On the contrary, other strategies such as reducing class sizes, improving teacher quality and increasing training for principals and teachers register far more support. Among African-Americans, only 5 percent believe vouchers are the best strategy.

What it Means…
The public views vouchers as a marginal strategy at best, and thinks public resources ought to be invested in other areas to generate the most improvement in public schools and to impact the largest number of students. African-American opinion is particularly telling. According to the poll, African-Americans are 7 times more likely to believe reducing class sizes, 5 times more likely to believe improving training for teachers and principals, and 4 times more likely to believe improving teacher quality will most improve public schools compared to giving out vouchers.

5) **Broad support exists for private voucher schools to be held publicly accountable.**
Americans of all backgrounds overwhelmingly expect schools that receive tax dollars via vouchers to meet certain accountability measures:

- 90 percent of adults want public disclosure of spending of tax dollars.
- 89 percent of adults want voucher schools to test and publicly report scores just as the public schools do.
- 89 percent of adults want voucher schools to be held to the same academic standards as public schools.
- 80 percent of adults want voucher schools to admit all students who apply.

What it Means…
The public overwhelmingly believes that public dollars demand public oversight. No matter what one's party affiliation, ideology, or views on vouchers, Americans clearly expect private schools receiving vouchers to be held *publicly* accountable. For example, 90 percent of Republican *and* Democrats agree that students in voucher schools should take the same state tests as public school students, with the results made public. Ninety (90) percent of Republicans *and* 88 percent of Democrats agree that students in voucher schools should have to meet the same academic standards as students in public schools. Likewise, 91 percent of Democrats *and* 88 percent of Republicans agree that private schools taking vouchers should publicly disclose how they spend those dollars.

Importantly, Americans' perceptions of a voucher program are starkly different from existing programs and proposals, which frequently do not contain the basic accountability measures that the public so clearly expects. For example, the Milwaukee and Cleveland programs do not require students in voucher schools to meet state academic standards. Neither of those programs, nor the Florida one, reports student test scores. And, evidence from Milwaukee and Cleveland indicate that costlier and harder to educate students are often excluded from the voucher programs because few private schools can serve them.

6) **The public opposes giving vouchers to students already attending private schools.**
Sixty-one (61) percent of all adults and 74 percent of African-Americans oppose vouchers for existing private school students. Worth noting however, is that 66 percent of those who *strongly* support vouchers do think current private school students should get a voucher.

What it Means…

Existing voucher programs and most voucher proposals do allow for the grandfathering of current private school students. During the 1998-99 school year in which the Milwaukee program experienced its greatest growth, nearly half of the new vouchers went to students who already had been attending a private school without government assistance. Such a policy represents a new expense to all taxpayers and drains money from the public schools to subsidize a cost already being paid by individuals who made a private choice.

The poll's findings also suggest a battle occurring within the voucher movement. Although the current spin is to sell vouchers as a way for some students to "escape" the public schools, it should not go unnoticed that those individuals who said they *strongly* favor vouchers also favor giving vouchers to existing private school students. This suggests that for some voucher advocates the movement's ultimate goal is not so much about helping students leave the public schools as it is about having taxpayers subsidize the private choices some parents already have made.

Other Key Findings:

- *If vouchers are to be awarded*, the public opposes targeted programs.
  - Eighty-nine (89) percent of adults and 90 percent of African-Americans oppose targeting vouchers only to students in urban public schools.
  - Seventy-seven (77) percent of adults and 75 percent of African-Americans oppose targeting vouchers only to students in failing public schools.
  - Only 14 percent of adults and 17 percent of African-Americans favor vouchers only for students from low-income families. In contrast, 54 percent of adults and 49 percent of African-Americans prefer vouchers to be available to students regardless of family income.
  - In contrast to the opposition for targeted programs, 73 percent of adults and 75 percent of African-Americans would prefer vouchers for any public school student.

·NSBA·

NSBA / Zogby International Poll
School Vouchers: What the Public Thinks and Why

Numbers are the Percentage of Respondents Giving that Answer

Question	Adults	Voters	African-Americans
1) Of the following ways to use public tax dollars, which is the best approach to improving public schools?			
Reducing Class Sizes	28	27	36
Improving Teacher Quality	25	27	23
Increasing Training for Teachers/Principals	23	23	26
Providing Parents with School Vouchers	**12**	**13**	**5**
Renovating or Building New Schools	6	6	6
None of the Above	3	3	2
2) Congress and some states are considering using tax dollars to provide vouchers for students to send their children to a private or religious school if they wish. Would you strongly favor, somewhat favor, somewhat oppose or strongly oppose such a measure?			
Strongly Favor	24	24	19
Somewhat Favor	24	23	22
Total Favor	**48**	**47**	**41**
Strongly Oppose	32	33	41
Somewhat Oppose	16	16	16
Total Oppose	**48**	**49**	**57**
3) If using tax dollars to provide vouchers for private schools will mean a loss of tax dollars for public schools, would you still support the idea of vouchers? *(question asked only to voucher supporters)*			
Yes	56	57	37
No	39	38	57
I will now read you a series of statements. Please tell me if you strongly agree, somewhat agree, somewhat disagree or strongly disagree with each statement.			
4) Vouchers should be used to pay for children already enrolled in a private or a religious school?			
Agree	35	33	23
Disagree	61	63	74

Question		Adults	Voters	African-Americans
5) If a school accepts public tax dollars in the form of a tuition voucher, its students should be required to meet the same academic standards as students in public schools.				
	Agree	89	89	89
	Disagree	9	8	9
6) If a school accepts public tax dollars in the form of a tuition voucher, it should be required to admit all students, regardless of academic or physical abilities.				
	Agree	80	80	87
	Disagree	17	17	11
7) If a school accepts tuition vouchers, it should be required to publicly disclose how it spends public tax dollars?				
	Agree	90	90	86
	Disagree	8	8	13
8) Schools that accept vouchers should be required to give their students the same state tests as public school students, and report those test results so that parents can compare the schools.				
	Agree	89	90	93
	Disagree	8	8	5
9) Vouchers should be available to any public school student.				
	Agree	73	70	75
	Disagree	24	25	22
10) Vouchers should be available only to students from urban public schools.				
	Agree	7	7	6
	Disagree	89	89	90
11) Vouchers should be available only to students from public schools that fail to meet state academic standards.				
	Agree	19	19	19
	Disagree	77	77	75
12) If vouchers are used, should they be used to pay for part of the tuition or the full tuition at private and religious schools?				
	Part Tuition	56	56	39
	Full Tuition	27	27	47
	Not Sure	17	17	14
13) Should vouchers be used to pay tuition only for children from families whose income is low (at or below the poverty level), for children from both low and middle-income families, or for all children, regardless of family income?				
	All Incomes	54	54	49
	Low and Middle	27	26	28
	Low Income	14	16	17

Question	**Adults**	**Voters**	**African-Americans**
14) Now I will read you two statements. Please tell me which one, A or B, comes closer to your opinion? Statement A: If vouchers were used in your school district, it would improve public schools by creating competition with private schools. Statement B: If vouchers were used in your school district, it would hurt public schools by taking tax dollars from those schools.			
Help Public Schools	43	42	34
Hurt Public Schools	49	49	60

I. Methodology and Sample Characteristics

Zogby International conducted interviews of 1,211 adults, including 1,086 likely voters nationwide, chosen at random, and an oversample of 301 African-Americans. All calls were made from Zogby International headquarters in Utica, N.Y., from Wednesday, May 23, to Thursday, May 30, 2001. The margin of error is +/- 3.0%. Slight weights were added to region, party, age, race, religion and gender to more accurately reflect the population overall. The same weights, except race, were applied to the African American oversample. The margin of error is +/- 5.7%. Margins of error are higher in sub-groups.

Sample Characteristics	Adults		African American adults	
	Frequency	Valid Percent*	Frequency	Valid Percent*
Sample size	1,211	100	301	100
East	279	23	66	22
South	315	26	120	40
Central/Great Lakes	375	31	93	31
West	242	20	21	7
Registered voters	1,113	92	288	96
Not registered to vote	98	8	13	4
Very likely to vote	1,013	91	248	86
Somewhat likely to vote	73	7	33	12
Not likely to vote	25	2	6	2
Democrat	391	36	219	78
Republican	348	32	21	7
Independent	255	21	31	11
Libertarian	5	1	--	--
Did not answer party	--	--	20	--
18-29	227	19	60	20
30-49	465	39	119	40
50-64	251	21	60	20
65+	251	21	60	20
18-24	141	12	34	11
25-34	182	15	58	20
35-54	462	39	105	35
55-69	231	19	59	20
70+	177	15	42	14
Did not answer age	18	--	3	--
Less than h.s. education	56	5	21	7
High school graduate	262	22	59	20
Some college	371	31	114	38
College graduate +	519	43	106	35
Did not answer education	2	--	2	--
White	927	77	--	--
Hispanic	96	8	--	--

BEST COPY AVAILABLE

Sample Characteristics (continued)	Frequency	Valid Percent*	Frequency	Valid Percent*
African American	132	11	301	100
Asian/Pacific	12	1	--	--
Other (race)	36	3	--	--
Did not answer race	7	--	--	--
Large city	369	31	159	53
Small city	271	22	72	24
Suburbs	260	22	43	14
Rural	302	25	23	8
Not sure	8	1	2	1
Progressive	76	6	32	11
Liberal	242	20	84	28
Moderate	378	32	92	31
Conservative	360	30	64	21
Very conservative	70	6	6	2
Libertarian	15	1	7	2
Not sure	61	5	15	5
Did not answer ideology	9	--	2	--
Roman Catholic	301	25	18	6
Protestant	577	48	150	50
Jewish	36	3	--	--
Muslim	2	0	3	1
Other (religion)	286	24	129	43
Did not answer religion	8	--	1	--
Born-again Christian	309	44	88	56
Not born-again Christian	396	56	67	43
Union member	240	20	84	28
Non-union	968	80	216	72
Parent of child under 17 living at home	383	32	99	33
Not a parent of child under 17	828	68	200	67
Less than $15,000	137	13	46	16
$15,000-$24,999	140	13	49	17
$25,000-$34,999	186	17	42	14
$35,000-$49,999	179	16	56	19
$50,000-$74,999	211	19	50	17
$75,000 or more	240	22	46	16
Did not answer income	118	--	12	--
Male	584	48	135	45
Female	627	52	166	55
Works outside home	334	53	78	47
Does not work outside	293	47	87	53
Did not answer work	584	--	136	--

*** Percentages are rounded to the nearest number and might not equal 100.**

·NSBA·

What's Wrong with Vouchers?
Existing Programs Provide Ample Answers

Forty-seven million children. That's how many K-12 students attend an American public school, roughly 9 out of every 10 students. So let's separate ourselves momentarily from the ideological arguments over school vouchers and examine the issue from a practical standpoint. Based on those numbers, any serious policy measure intended to improve the education of our students ought to start with the public schools, or, at the very least, consider the impact on them.

Think about it: even if 10 percent of public school students transferred to a private school – perhaps via a voucher – 80 percent of the nation's children still would attend public schools. That means this question must be asked: Would vouchers for some students lead to a better education for all those students still in public schools? While that may not be the purpose of school vouchers, it nonetheless needs to be answered. The futures of 47 million children demand it.

IBM Chairman and CEO Louis V. Gerstner, Jr. seemed to agree in a speech he made to the Commonwealth Club of California last October. Touching just briefly on vouchers, he said this: "The fundamental premise of our democratic system of government is based on citizens educated in a vibrant, healthy system of free public education. If our schools don't work, our country won't work. So the objective here must be to fix the system. The objective is not to build a few special schools or help a few, or even a few thousand, selected children. To help all the children – and that must be our objective – we have to begin with a commitment to fix our problem, not wire around it."

Today, much of the debate over vouchers revolves around theories, and the positives or negatives that *could* occur as a result of voucher implementation. Yet existing programs provide real answers to many such questions.

1) Vouchers do drain dollars from the public schools.

For example, there is no disputing the fact that *vouchers create a direct drain on public school budgets*. Take Milwaukee, home to the nation's largest and longest-running voucher program, which enrolled just under 10,000 students last year and cost taxpayers $49 million. State aid, half of which was diverted from the Milwaukee Public Schools and half of which was diverted from all other Wisconsin public school districts, covered the cost. That formula led to 238 public school districts losing tax dollars to Milwaukee *private* schools, and causing increases in local property taxes to offset the lost funds. And, at the same time that millions of dollars are flowing to private schools, the Milwaukee Public Schools, which serve 10 times as many students as the voucher program, have cut programs because of a budget shortfall of up to $19.6 million. Last year, the public schools faced $32 million in budget cuts.

Meanwhile, the smaller voucher program in Cleveland cost taxpayers $13.9 million last year, with the money redirected from state aid that otherwise would go to help disadvantaged Cleveland public school students through smaller class sizes, pre-school and all-day kindergarten, and reading improvement programs. In addition, the voucher program, like Milwaukee's, permits existing private school students to claim vouchers and many in fact do so. All of which begs this question: "How do the public schools improve by losing tax dollars that now subsidize the tuition of students who already attended a private school?"

2) Vouchers do leave behind the neediest students.

As with the financial consequences, there also is proof that *vouchers leave many needy students behind.* The evidence comes from voucher advocates, parents of former voucher students, and participating private schools. The one-time leader of the voucher push in Ohio and a former operator of Cleveland voucher schools, made this revealing comment in a memo to the state's governor: "Numerous scholarship (voucher) recipients were discouraged from taking their scholarships to private schools with the full knowledge that none of the existing private schools will be to handle a seriously handicapped child." A state education official confirmed such exclusionary practices, noting that special education students "were actively counseled out of the program."

Many parents whose children have withdrawn from the Cleveland program have informed state officials through exit interviews of the shortcomings inherent in the program. Several have noted that the program "does not provide for special needs students." Wrote one: "My son receives half day regular classes, half day special classes, and I couldn't find a school that would take him in…." Clearly, for those parents and children, the "choice" their voucher promised rang rather hollow.

Likewise, the Milwaukee program contains similar deficiencies. Numerous voucher schools acknowledge their inability to serve special needs students. For example, the Agape Center for Academic Excellence indicates it cannot serve students who are "hearing disabled unless they can read lips." The Blessed Sacrament School notes that "students who are 2-3 years below grade level cannot be realistically brought up to grade level because we do not have a tutorial/learning center to accommodate their needs." Our Lady Queen of Peace School candidly announces that "we have no programming for emotionally disturbed or educationally mentally retarded youngsters. We can educate children with physical disabilities, but we have no easy access to the school building."

Meanwhile, the female African-American lawmaker who founded the Milwaukee program has told reporters that private schools admit voucher-bearing African-American male students, but later reject or expel them. Voucher students do not have the due process rights of public school students. This practice, along with the private schools' limitations in serving special education students, can only result in an increased percentage of high needs students remaining in or returning to the public schools, albeit with fewer resources. "If society wants to make a conscious decision that the role of the public schools will be to take care of all the kids that no one else wants, then let's say that. Let's not back into it because of a political agenda," Milwaukee Superintendent Spence Korte recently told a *Boston Globe* reporter.

3) Vouchers do not provide adequate accountability to taxpayers.
Current voucher programs also have clearly resolved whether vouchers provide taxpayer accountability. The answer is a resounding NO. Americans have come to expect that any program funded by the taxpayers will be accountable to those taxpayers. This is to protect the taxpayers from having their hard-earned money spent improperly, and to protect the individuals who utilize the tax-supported program. Yet *vouchers make a mockery of accountability* by channeling tax dollars into private schools that need not comply with open meetings and records laws, adhere to state academic standards, or publicly report on students' academic achievement. Thus, although the public has an interest in what students are taught, how well they are learning, and the environment in which they are learning, vouchers eliminate taxpayers' oversight of the expenditure of these public funds.

Loose regulations and the lack of public oversight inherent in voucher programs have contributed to several instances where taxpayers have been scammed. There was the case of two Milwaukee voucher schools falsely inflating their student enrollment numbers and overcharging taxpayers $390,000. There was the discovery that Ohio taxpayers were charged $3.5 million in taxicab fees to send children to voucher schools, including nearly a half million dollars in erroneous overpayments for students who were absent or not even enrolled in the voucher schools.

Worse still was the discovery by a pair of Cleveland journalists that a city voucher school enrolling 100 students and claiming $268,000 in taxpayer money was not fit to be called a school. The 110-year-old building had no fire alarm, no sprinkler system, broken windows, lead paint flaking off the walls at dangerous levels, and little, if any, heat in the winter. Academically, two-thirds of the school's teachers were unlicensed, including one who had been convicted of first-degree murder for a bar room shooting.

Voucher proponents often try to sidestep the accountability issue by offering that the private school parents will hold the schools accountable. But when *all* taxpayers are supporting the program, accountability must extend beyond the parents. Society's interest in knowing that all children are safe and learning should not end simply because of the type of school they attend. It is ironic that Florida lawmakers have mandated that parents who want to use a voucher to send their child to a better *public* school can only do so if that school has a ratings grade of "C" or higher. Yet no similar requirement exists if parents want to use the voucher to enroll their child in a *private* school. The condescending insinuation is that a parent who picks a private school is smart enough and savvy enough to know whether that school is better, but a parent who picks a public school cannot be trusted to make such a well-informed decision.

While expensive and polished television and radio ads loudly make the case *for* vouchers, evidence from existing voucher programs paint a far different picture. Gerstner got it right. Our country must have a vibrant, healthy public school system. We must all focus on building up our public schools, not abandoning them and relegating 47 million children to schools that become an afterthought to lawmakers and citizens.

August, 2001

#####

VOUCHERS AND TAX CREDITS: 2001 LEGISLATION

[illegible]rcus Egan, Director, NSBA Voucher Strategy Center

During their 2001 legislative sessions, no fewer than 38 states have had vouchers and/or tuition tax credit bills introduced. With most of these sessions now adjourned, a review of voucher activity shows that with very few exceptions, these measures have been defeated outright, or simply left to wither away at the committee level.

Here's a quick score sheet:

VOUCHERS

- Twenty-eight states had at least one school voucher bill introduced (some states experienced multiple measures).
- More than half of those state legislatures (19) adjourned without passing a voucher bill.
- Another four state legislatures still in session show little movement toward passing a voucher bill; for example, Illinois, [illegible]achusetts, New Jersey and New York all [illegible] voucher bills languishing in committees.
- In Wisconsin, the state budget bill included a major change in the funding structure of the Milwaukee voucher program. It now will be funded separately from public schools. This change was a result of a state report which revealed the existing funding structure had meant a loss of tax dollars to 238 public school districts.
- In Ohio, pending legislation would amend the Cleveland voucher program, but it has not been acted on.
- Florida, which has the only statewide voucher program in the nation, had multiple voucher measures before its legislature. Lawmakers did not pass a bill that would have authorized vouchers for students in overcrowded public schools. However, the legislature did expand an existing voucher program for special education students.
- Pennsylvania lawmakers approved a plan deemed by some to be an opening to vouchers. It authorizes up to a $500 grant for parents of low-performing elementary school students to purchase after school tutoring services.
- Louisiana lawmakers rejected or let die three voucher bills and defeated a voucher amendment to an early childhood education bill. Near the end of the session, however, they did approve a state budget amendment allowing $3 million in federal welfare funds to be spent on private school tuition for 600 pre-kindergarten students in New Orleans.

TUITION TAX CREDITS

- Twenty-seven states had at least one tuition tax credit bill introduced (some states saw multiple measures).
- Nineteen of those state legislatures adjourned without passing a tuition tax credit bill.
- Another six state legislatures still in session show no strong indications of passing a tuition tax credit bill; most remain stalled in committees.
- Florida and Pennsylvania lawmakers approved a corporate income tax credit for businesses that contribute to an organization that awards privately funded vouchers to students to attend private schools.

Note: Both Pennsylvania measures, the tutoring plan and tax credit plan, passed as part of a larger education bill. Support for both measures was seen as a trade-off for the governor's support of a 50 percent increase in lawmakers' pensions. The package also included a sizable pension increase for state employees, including teachers and a large increase in special education funding.

TRENDS

Escape Hatches

Many of the voucher bills in 2001 sessions were offered as escape valves for students in "failing" or "low-performing" public schools. At least 13 states saw such a bill. Here's a sampling:

- Alabama: a $2,000 voucher for students enrolled in a failing public school
- Arkansas: vouchers for students in a low-performing school district
- Connecticut: two bills giving vouchers to students in schools "in need of improvement"
- Georgia: two bills to give vouchers to low-income students in low-performing schools; voucher would be worth up to 90 percent of the public school per-pupil amount
- Massachusetts: three-city pilot of vouchers for students from low-performing public schools; voucher would be worth up to 75 percent of the public school per-pupil amount
- New Mexico: vouchers for students at schools that fail to meet state education standards
- Nevada: vouchers for low-income students in low-performing schools; voucher

Twenty-seven states had at least one tuition tax credit bill introduced (some states saw multiple measures). Nineteen of those state legislatures adjourned without passing a tuition tax credit bill.

would be worth up to amount equal to public school per-pupil amount

- Texas: six-school district pilot of vouchers for low-income students who score poorly on state assessments; voucher would be equal to public school per-pupil amount
- Washington: a $4,000 voucher for students enrolled in a low-performing public school

Other states facing a voucher bill aimed at students in failing schools were Arizona, Maryland, New Hampshire and Ohio.

This "failing school" approach is modeled after the Florida voucher program, enacted in 1999. Florida provides some stark lessons however for other states now facing this approach. Activity in that state shows vouchers for students in "failing schools" merely serves as an opening for a larger-scale voucher program. Voucher advocates in Florida, apparently dissatisfied that public school success has prevented widespread use of vouchers, have now enacted two other voucher programs. One plan allows the parents of any special education student in the state to obtain a voucher and transfer to a private school. The other plan is a corporate income tax credit for businesses that contribute to organizations which award privately funded vouchers for students to attend private schools. Pro-voucher lawmakers rejected attempts to amend the bill so that businesses that contribute to public school foundations could also receive the tax break. A bill to award $3,000 vouchers for students who attend "overcrowded" public schools (schools that exceed 120 percent of capacity) did not pass.

Stealth Vouchers

Voucher advocates believe that the public has soured on the term "voucher" and, as a result, they increasingly cloak voucher proposals in other terms. Consider the following euphemisms for vouchers in 2001 legislation:

- Alabama: SOS program, Student Opportunity Scholarships
- Arkansas: learning endowments (two years ago, it was child-centered scholarships)
- Arizona: opportunity scholarships
- Colorado: EASY program, Education Access Scholarship for our Youth program
- Florida: SCRIPT, School Crowding Relief Intervention for Parents and Teachers
- Georgia: Early HOPE Scholarship Program (borrowed from the state's popular college-level HOPE scholarship program)
- Illinois: educational choice act
- Kansas: Opportunity Scholarship Research Experiment
- Louisiana: school choice scholarships and alternative education grants
- Massachusetts: opportunity scholarships
- New Hampshire: parental choice scholarships
- New Mexico: children's educational guarantee act and kindergarten opportunity scholarships
- New York: elementary and secondary education improvement act
- Ohio: child-centered scholarships
- Virginia: education certificates
- Washington: opportunity scholarships and student improvement tuition scholarships.

Tax Credits

Voucher proponents have also recently intensified their push for tuition tax credits. Nearly as many states saw a tuition tax credit bill introduced as a voucher bill. With two states passing tuition tax credit legislation this year, six states now have a tuition tax credit program.

A previous criticism of tuition tax credits was that such programs do not benefit low-income children whose parents pay little, or perhaps no, income taxes. Another problem proponents faced was that parents would have to pay the upfront tuition costs and then wait for the tax benefit, again not a scenario likely to benefit low-income families. Current tuition tax credit strategies try to circumvent these flaws.

In 1997 Arizona enacted a tuition tax credit program that offers taxpayers a $500 tax credit for donations to third party organizations that fund private and religious school scholarships. The donation is not supposed to directly benefit the taxpayer's child, nor can it be earmarked for a specific school.

> *Nearly as many states saw a tuition tax credit bill introduced as a voucher bill. With two states passing tuition tax credit legislation this year, six states now have a tuition tax credit program.*

Purportedly, these third party organizations, sometimes called Scholarship Funding Organizations (SFOs), will use the donations to award "scholarships" or vouchers to low-income students. Numerous states have now tried the Arizona approach. In fact, in the 2001 sessions, 15 states had bills introduced offering a tax credit for contributions to SFOs.

An investigation into the Arizona program has revealed some abuses and loopholes. Despite statutory obstacles, many donations to private and religious school scholarship organizations were earmarked for students already enrolled in private schools. Since taxpayers are barred from making the contribution for their own child's private school tuition, some private school parents wrote checks for their friends' and relatives' children and then had the favor reciprocated.

Lack of accountability in the program is also a problem. Because scholarship organizations and schools face no reporting requirements, the state department of revenue cannot verify many taxpayers' claims that they are entitled to the credit.

Unlike a voucher program that can cap enrollment and cost, a tax credit program is open-ended in terms of participation and therefore cost. The Arizona Department of Revenue has estimated the tax credits could cost the state up to $80 million a year in lost revenue.

BEST COPY AVAILABLE

The Unlevel Playing Field:

How the rules differ for Ohio's public and private schools

Education
Information
Center

a publication of the

Education Information Center
8050 North High Street, Suite 100
Columbus, Ohio 43235-6482
(614) 540-4000 • fax (614) 540-4100
www.ohioeic.org

Table of contents

Introduction 1

The private school landscape 2

State funding for private schools in Ohio: 4
  Auxiliary services 4
  Administrative cost reimbursement 5
  Transportation 5
  Lottery profits 5

What do other states do? 8
  Public aid to private schools 8
  Unusual provisions 9

The unlevel playing field: How the rules differ for Ohio's public and private schools 10
  Free education for all students 10
  Special education 10
  Health and social services 10
  Instruction, curriculum and textbooks 11
  Transportation 12
  Student rights 13
  Employee rights, salaries and benefits 13
  Collective bargaining 14
  Financial operation 15
  Governance structure 16

References and acknowledgments 17

The Education Information Center is jointly-sponsored by the:
Buckeye Association of School Administrators
Ohio Association of School Business Officials
Ohio School Boards Association

EIC mission statement

The mission of the Education Information Center is to foster a better understanding of the role public education plays in Ohio and the United States, to create an environment of support for public schools and to respond to the challenge of preserving the future for our children.

Introduction

About 18 months ago, just after the Education Information Center had been created, a treasurer from an Ohio school district facing an uphill battle to pass a property tax levy was sharing some of his frustration with me.

"The voters in our district keep asking us why we can't be like private schools," he said. "They want to know why we spend more money. Do you have anything on paper – short, straightforward and easy to read – that will show them how unlevel the playing field really is for public and private schools?"

This report is a response to that treasurer's request. It appears at a time when events in Ohio and across the United States have refocused attention on the differences between public and private schools.

A 1994 survey entitled *Assignment Incomplete: The Unfinished Business of Education Reform* showed that support for public schools is declining because most Americans believe private schools do a better job in the areas most important to them – safety, order, higher academic standards and smaller classes.

"It's kind of high noon for public education," said Deborah Wadsworth, executive director of Public Agenda, the research group that issued the survey. "There's a window of opportunity to regain support but only if the public is convinced that the essentials are being delivered."

In 25 states, legislation has been enacted that allows the formation and operation of charter schools, publicly funded entities that, to varying degrees, are free of the legal and administrative restraints that face conventional public schools. About 350 charter schools are now functioning across the nation.

In Cleveland, the voucher program enacted by the Ohio General Assembly in 1995 began with the 1996-97 school year. About 1,500 low-income students from the Cleveland public schools are participating. The program is the first in the nation to allow public money to be used to pay student tuition at private, sectarian elementary schools.

Proponents of private schools claim they do a better job of educating students, and at less cost, than public schools. Proponents of public schools counter that they face a tougher challenge because they must educate all students, regardless of their abilities, and because they must adhere to laws and administrative rules that do not apply to private schools.

Is either side right? If so, which one? The answers to those questions will not be found here. This report does not attempt to compare either the student achievement levels or the spending levels of public and private schools. Instead it attempts to do four things:

- briefly describe the private school landscape in Ohio and show where in our state private schools are located;
- outline the sources of state funding for private elementary and secondary schools and the authorized uses for that money;
- show the kind of funding and services that other states provide for private schools;
- detail the different ways in which the state regulates public and private schools in Ohio.

These differences are numerous and dramatic, and even though not all of them are included here, they make up the longest section of this report. The format and content of the section are based on a 1995 report released by the Kansas Association of School Boards entitled *Different Rules: The Myth of Competition Between Public and Private Schools in Kansas.*

As the final section of this report shows, the playing field for public and private schools in Ohio is indeed unlevel. I hope this report will help that treasurer trying to pass a property tax levy – and many others like him – to demonstrate how unlevel it is to parents, taxpayers, lawmakers, the business community and the general public.

Douglas Putnam,
Director
Education Information Center
December 1996

The private school landscape

In the fall of 1996, nearly 5.8 million students were enrolled in private elementary and secondary schools in the United States.

That number represents 11.2% of the nation's total enrollment of 51.7 million in all public and private elementary and secondary schools in 1996.

The U.S. Department of Education's 1994 survey of private schools indicated that 26,093 elementary and secondary schools were operating in the United States. Of those, 32% were Catholic schools, 47% were schools affiliated with other religious sects and 21% were nonsectarian schools. Catholic schools enrolled 51% of the private school students nationwide. Other religious schools enrolled 34% and nonsectarian schools enrolled 15%.

Private elementary and secondary schools, enrollment, FTE teachers, and high school graduates, by state United States, 1993-94

state	*number of schools*	*enrollment*	*teachers*	*high school graduates 1991-92*
United States	***26,093***	***4,836,442***	***338,162***	***247,278***
Alabama	410	72,630	5,424	4,174
Alaska	*66*	*5,884*	*476*	*213*
Arizona	263	41,957	2,796	2,415
Arkansas	*179*	*29,011*	*2,023*	*1,023*
California	3,145	569,062	35,170	24,436
Colorado	*391*	*53,732*	*4,115*	*1,826*
Connecticut	360	70,198	6,345	6,291
Delaware	*90*	*22,308*	*1,780*	*1,446*
District of Columbia	80	15,854	1,544	1,054
Florida	*1,262*	*233,743*	*16,842*	*9,820*
Georgia	580	97,726	8,283	5,630
Hawaii	*121*	*30,537*	*2,144*	*1,886*
Idaho	78	8,019	522	341
Illinois	*1,347*	*293,038*	*17,550*	*14,724*
Indiana	619	91,986	6,139	4,061
Iowa	*290*	*50,602*	*3,291*	*2,495*
Kansas	206	37,045	2,382	1,668
Kentucky	*296*	*58,058*	*3,815*	*2,949*
Louisiana	458	145,512	9,286	7,844
Maine	*140*	*16,999*	*1,535*	*1,914*
Maryland	522	112,481	8,646	5,648
Massachusetts	*648*	*126,744*	*11,329*	*10,281*
Michigan	1,075	187,741	11,322	8,925
Minnesota	*542*	*86,051*	*5,595*	*3,453*
Mississippi	221	58,655	3,995	3,901
Missouri	*719*	*117,466*	*7,973*	*5,839*
Montana	82	9,111	684	355
Nebraska	*223*	*39,564*	*2,575*	*1,904*
Nevada	58	10,723	654	646
New Hampshire	*130*	*18,386*	*1,742*	*1,730*
New Jersey	878	195,921	14,281	11,025

New Mexico	*166*	*20,007*	*1,569*	*1,029*
New York	1,985	473,119	34,771	26,625
North Carolina	*463*	*69,000*	*5,746*	*2,983*
North Dakota	59	7,577	529	332
Ohio	***1,016***	***246,805***	***14,872***	***12,398***
Oklahoma	190	25,837	2,250	1,536
Oregon	*250*	*34,092*	*2,254*	*1,700*
Pennsylvania	1,846	342,298	21,880	18,532
Rhode Island	*112*	*23,153*	*1,835*	*1,408*
South Carolina	297	51,600	3,989	2,383
South Dakota	*96*	*9,575*	*707*	*254*
Tennessee	496	84,538	6,684	4,970
Texas	*1,353*	*211,337*	*16,726*	*8,447*
Utah	66	9,793	749	590
Vermont	*85*	*9,107*	*945*	*1,120*
Virginia	515	84,438	7,391	4,580
Washington	*486*	*70,205*	*4,798*	*2,644*
West Virginia	145	13,539	1,085	672
Wisconsin	*945*	*141,762*	*8,927*	*5,129*
Wyoming	35	1,919	167	31

Source: Private School Universe Survey, 1993-94, National Center for Education Statistics, U.S. Department of Education.

In Ohio, private elementary and secondary schools are divided into two general groups: chartered nonpublic schools and registered nonpublic schools.

Chartered nonpublic schools receive charters from the state, adhere to nearly all of the state's prescribed minimum standards and are eligible to receive state aid for certain administrative and clerical expenses, textbooks, science equipment, health care, transportation and other non-religious services.

In 1996, there were 880 chartered nonpublic schools in Ohio. They served an average daily membership of 234,448, about 12% of the state's total K-12 average daily membership. The Catholic Conference of Ohio – with dioceses based in Cincinnati, Cleveland, Columbus, Steubenville, Toledo and Youngstown – included 536 schools, 61% of Ohio's total chartered nonpublic schools.

Registered nonpublic schools need not receive charters from the state in order to operate. Instead, they notify, or register, with the Ohio Department of Education each school year. In 1995-1996, 178 private schools in the state filed letters of registration with the Ohio Department of Education. These schools are not required to adhere to the state's minimum standards and are not eligible to receive state aid.

State funding for private schools in Ohio

Under current law, state aid to chartered nonpublic schools is distributed for three major purposes: auxiliary services, administrative cost reimbursement, and pupil transportation. Ohio's chartered nonpublic schools also have received funds generated by the state lottery. Each purpose is described below.

Auxiliary services

Ohio Revised Code (ORC) section 3317.024 (P) authorizes the Department of Education to distribute money to each public school district in the state for the purpose of providing services to students attending chartered nonpublic schools within that public school district.

The Ohio General Assembly appropriated $85.4 million in fiscal year 1996 and $91.4 million in fiscal year 1997 for auxiliary services. ORC section 3317.06 allows the money to be used for the following purposes:

- textbooks;
- speech and hearing diagnostic services;
- health services, as long as they also are provided to public school students in the district;
- psychological, speech and hearing services;
- guidance and counseling services;
- remedial teaching services, as long as they also are provided to public school students in the district;
- standardized testing and scoring services;
- services for handicapped and gifted children;
- employees who supervise or assist in the delivery of the services allowed under ORC 3317.06;
- nonideological computer software, video laserdiscs, compact discs and video cassette cartridges;
- mathematics and science equipment;
- tuition payments, in an amount up to $1 million per year, for students enrolled in the post-secondary enrollment options program – this authority is temporary and expires on June 30, 1997;
- replacement and repair of mobile units used to provide services to students in chartered nonpublic schools (ORC 3317.064).

Ohio school districts with highest nonpublic average daily memberships fiscal year 1995

	school district	*county*	*non-public ADM*	*total auxiliary service payments FY 1995*
1.	Cincinnati City	Hamilton	17,981	$6,270,155
2.	*Cleveland City*	*Cuyahoga*	*16,247*	*$5,665,491*
3.	Columbus City	Franklin	11,309	$3,943,561
4.	*Toledo City*	*Lucas*	*10,486*	*$3,656,573*
5.	Parma City	Cuyahoga	7,542	$2,598,587
6.	*Dayton City*	*Montgomery*	*5,869*	*$1,524,211*
7.	Akron City	Summit	5,049	$1,760,637
8.	*Youngstown City*	*Mahoning*	*3,948*	*$1,376,707*
9.	Northwest Local	Hamilton	3,787	$1,313,591
10.	*University Heights-Cleveland Heights City*	*Cuyahoga*	*3,348*	*$1,167,481*
11.	Oak Hills Local	Hamilton	2,980	$1,039,156
12.	*Kettering-Moraine City*	*Montgomery*	*2,699*	*$ 822,956*
13.	South Euclid-Lyndhurst City	Cuyahoga	2,440	$ 850,852
14.	*Lakewood City*	*Cuyahoga*	*2,411*	*$ 840,740*
15.	Garfield Heights City	Cuyahoga	2,283	$ 796,105
16.	*Sycamore Community*	*Hamilton*	*2,143*	*$ 747,286*
17.	Finneytown Local	Hamilton	2,096	$ 730,896
18.	*Hamilton City*	*Butler*	*2,061*	*$ 718,691*
19.	Washington Local	Lucas	2,058	$ 767,859
20.	*Rocky River City*	*Cuyahoga*	*2,055*	*$ 716,599*
21.	Euclid City	Cuyahoga	2,027	$ 706,835
22.	*Elyria City*	*Lorain*	*1,983*	*$ 691,492*

23.	Shaker Heights City	Cuyahoga	1,944	$ 677,892
24.	*Lorain City*	*Lorain*	*1,924*	*$ 670,918*
25.	Hudson Local	Summit	1,820	$ 634,652
26.	*Indian Hills EVSD*	*Hamilton*	*1,804*	*$ 629,073*
27.	Mentor EVSD	Lake	1,749	$ 609,894
28.	*Chardon Local*	*Geauga*	*1,550*	*$ 540,501*
29.	Gahanna City	Franklin	1,516	$ 528,644
30.	*Springfield Local*	*Lucas*	*1,515*	*$ 528,296*

Note: Nonpublic school ADMs for public school districts are calculated by determining the number of students who attend chartered nonpublic schools situated within the boundaries of the public school district, regardless of the students' places of residence.
Source: Ohio Department of Education, Office of Policy Research and Analysis.

Administrative cost reimbursement

ORC Section 3317.063 entitles chartered nonpublic schools to reimbursement from the state for the administrative and clerical expenses they incur when preparing, filing and maintaining records required by state law. Examples of reimbursable administrative costs include those related to charter approval, student attendance, student health testing, teacher certification, unemployment and worker's compensation, and student proficiency testing.

The General Assembly increased the maximum per-pupil amount for administrative reimbursement from $75 to $150 in 1995 to provide funds for student proficiency testing in chartered nonpublic schools. In 1996, the General Assembly increased the maximum per-pupil reimbursement amount to $250.

Transportation

Public school boards must provide transportation for students residing in their districts who attend nonpublic schools that are more than two miles from their homes. This requirement is subject to the following conditions: 1) the nonpublic school is in compliance with state minimum standards, although it need not be a chartered school; and 2) the travel time from the collection point to the nonpublic school is not more than 30 minutes.

Unlike payments for auxiliary services and administrative cost reimbursements, funding for transportation of nonpublic schools does not arise from a separate line item in the state budget. It is instead a cost assumed by public school districts as part of their overall transportation costs.

Nonpublic schools and the Ohio Lottery

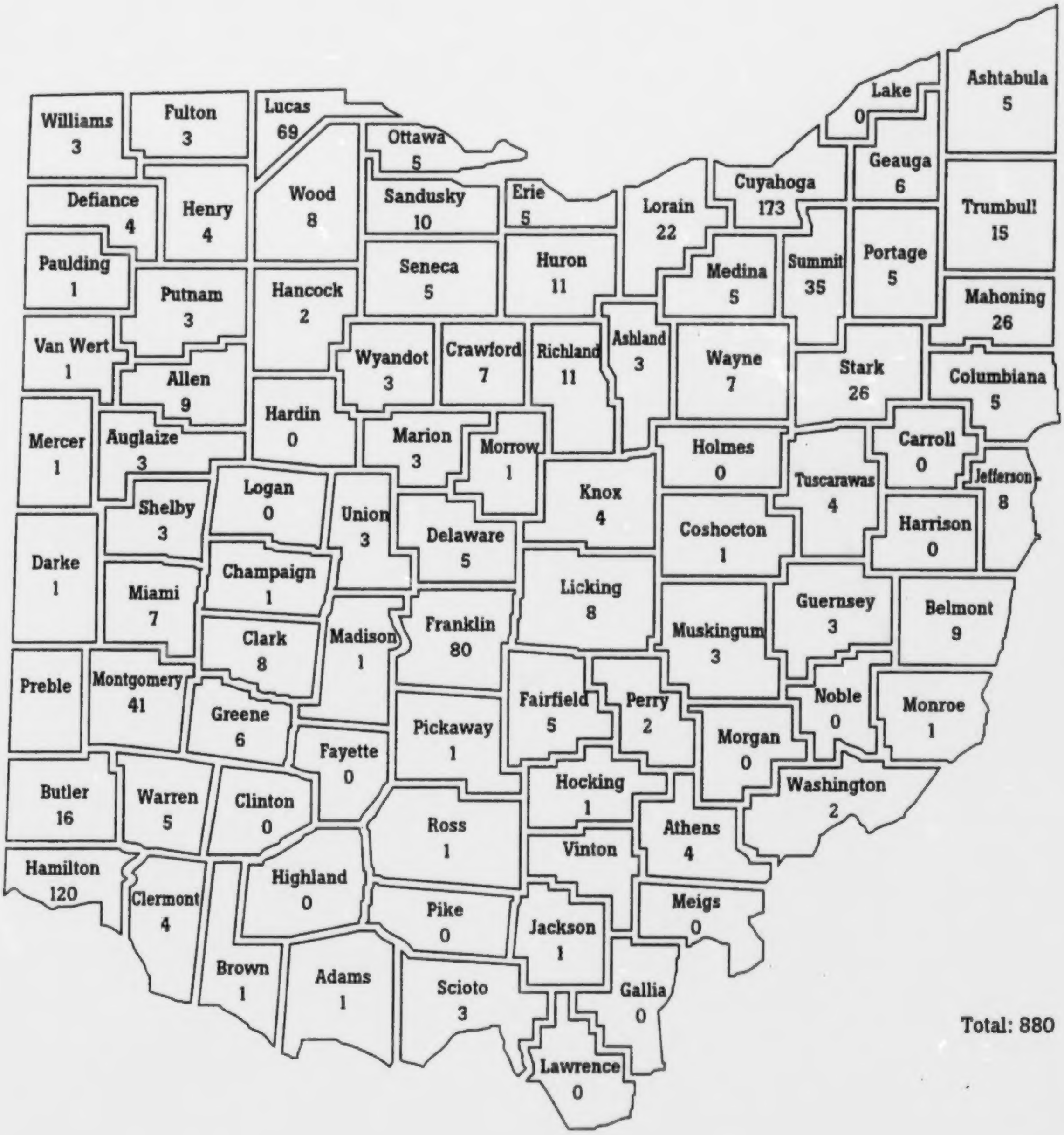
For many years, state law has authorized the distribution of money generated by the Ohio Lottery to chartered nonpublic schools. The schools are entitled to receive a small portion of "excess lottery profits" – the amount of money above and beyond the original earnings estimate predicted for the lottery at the beginning of the state's two-year budget cycle.

When the lottery generates enough revenue to trigger the distribution of excess profits, the Department of Education distributes the revenue in accordance with a priority list established by the General Assembly in the state budget bill. In the 1996-97 budget cycle, excess profits are to be used for additional state foundation aid (if necessary), a reserve fund, school facilities, asbestos removal, handicapped access and, lastly, per-pupil distributions to school districts.

Chartered nonpublic schools receive 2.57% of the money distributed to schools on a per-pupil basis. Public school districts receive the remaining 97.43%.

Excess lottery profits are not distributed each year to chartered nonpublic schools or to public school districts. They are distributed only in years when the lottery generates excess profits and when the items ranking above per-pupil distribution on the priority list receive their allocations. Per-pupil distributions to chartered nonpublic schools have occurred in fiscal years 1985, 1986, 1987, 1989, and 1990. However, the authority to distribute lottery money to chartered nonpublic schools remains a standard feature of state law.

Chartered nonpublic schools 1995-1996 school year by county

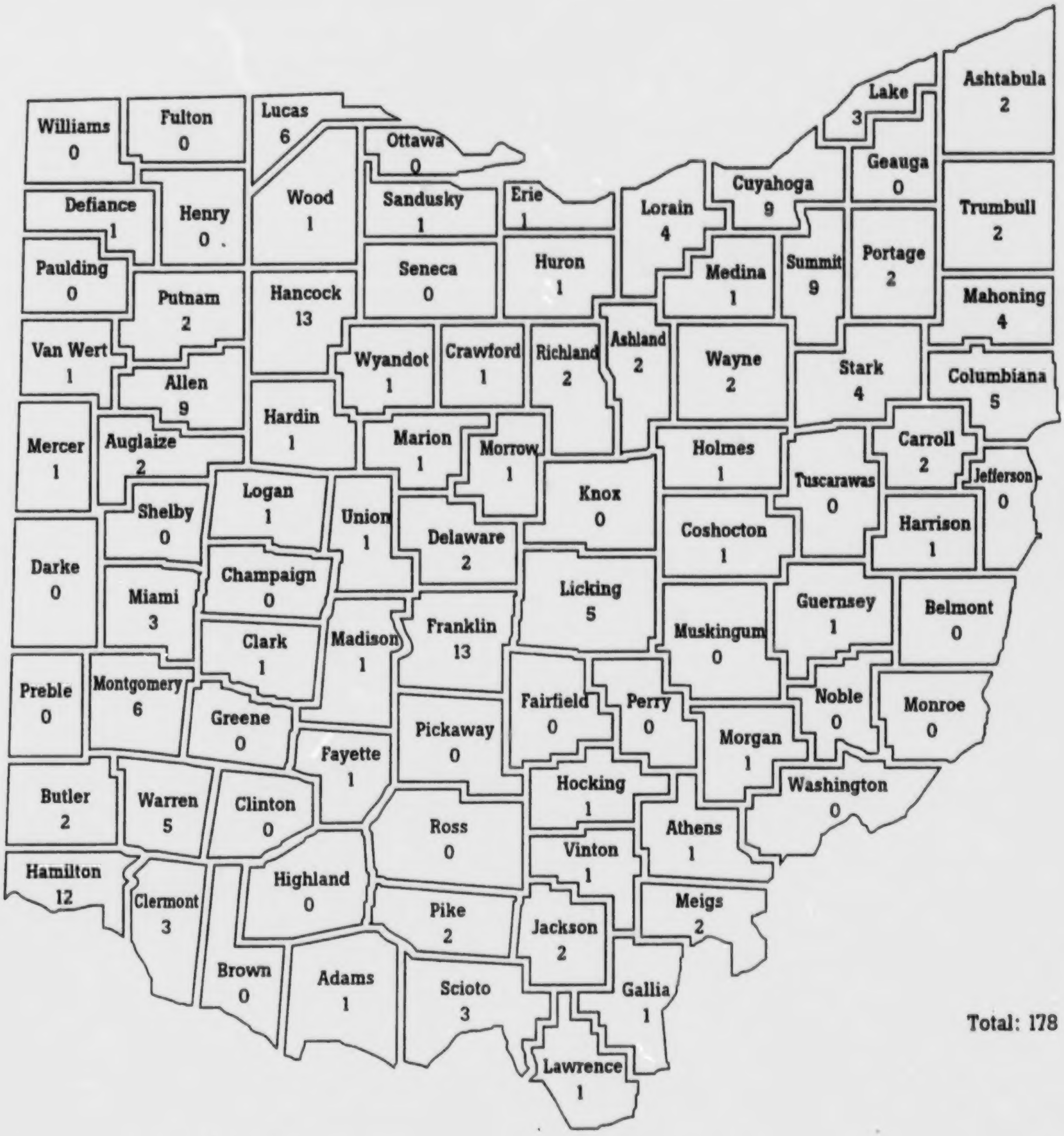


Williams 3
Fulton 3
Lucas 69
Ottawa 5
Defiance 4
Henry 4
Wood 8
Sandusky 10
Erie 5
Lorain 22
Cuyahoga 173
Lake 0
Ashtabula 5
Geauga 6
Trumbull 15
Paulding 1
Putnam 3
Hancock 2
Seneca 5
Huron 11
Medina 5
Summit 35
Portage 5
Mahoning 26
Van Wert 1
Allen 9
Wyandot 3
Crawford 7
Richland 11
Ashland 3
Wayne 7
Stark 26
Columbiana 5
Mercer 1
Auglaize 3
Hardin 0
Marion 3
Morrow 1
Holmes 0
Carroll 0
Jefferson 8
Shelby 3
Logan 0
Union 3
Delaware 5
Knox 4
Coshocton 1
Tuscarawas 4
Harrison 0
Darke 1
Miami 7
Champaign 1
Licking 8
Muskingum 3
Guernsey 3
Belmont 9
Clark 8
Madison 1
Franklin 80
Preble
Montgomery 41
Greene 6
Fairfield 5
Perry 2
Noble 0
Monroe 1
Pickaway 1
Fayette 0
Morgan 0
Butler 16
Warren 5
Clinton 0
Hocking 1
Washington 2
Ross 1
Vinton
Athens 4
Hamilton 120
Clermont 4
Highland 0
Pike 0
Jackson 1
Meigs 0
Brown 1
Adams 1
Scioto 3
Gallia 0
Lawrence 0

Total: 880

Source: Ohio Educational Directory 1995-96 School Year

Registered nonpublic schools 1995-1996 school year by county


Williams 0
Fulton 0
Lucas 6
Ottawa 0
Lake 3
Ashtabula 2
Defiance 1
Henry 0
Wood 1
Sandusky 1
Erie 1
Lorain 4
Cuyahoga 9
Geauga 0
Trumbull 2
Paulding 0
Putnam 2
Hancock 13
Seneca 0
Huron 1
Medina 1
Summit 9
Portage 2
Mahoning 4
Van Wert 1
Allen 9
Wyandot 1
Crawford 1
Richland 2
Ashland 2
Wayne 2
Stark 4
Columbiana 5
Mercer 1
Auglaize 2
Hardin 1
Marion 1
Morrow 1
Holmes 1
Carroll 2
Tuscarawas 0
Jefferson 0
Shelby 0
Logan 1
Union 1
Knox 0
Delaware 2
Coshocton 1
Harrison 1
Darke 0
Miami 3
Champaign 0
Licking 5
Guernsey 1
Belmont 0
Clark 1
Madison 1
Franklin 13
Muskingum 0
Preble 0
Montgomery 6
Greene 0
Fairfield 0
Perry 0
Noble 0
Monroe 0
Fayette 1
Pickaway 0
Morgan 1
Butler 2
Warren 5
Clinton 0
Hocking 1
Washington 0
Ross 0
Athens 1
Hamilton 12
Clermont 3
Highland 0
Vinton 1
Pike 2
Jackson 2
Meigs 2
Brown 0
Adams 1
Scioto 3
Gallia 1
Lawrence 1

Total: 178

Source: Ohio Department of Education

BEST COPY AVAILABLE

What do other states do?

State support for private schools varies widely. Some states, like Ohio, provide significant amounts of money and aid through several major programs, including textbook loans, transportation and auxiliary services. Other states offer virtually no support other than federal funding for school meal programs that is simply passed through state agencies to local school districts.

In many states, like Ohio, aid is provided to nonpublic schools despite provisions in state constitutions that prohibit it. In 1977, in the case of *Wolman v. Walter*, the United States Supreme Court declared that the state of Ohio, for specified purposes, could spend public money for the benefit of children attending nonpublic schools. Those specified purposes include the purchase of standardized testing devices, secular textbooks and other teaching materials and the provision of diagnostic and therapeutic services.

In the same case, the United States Supreme Court also declared that expenditures capable of diversion to a religious use were unconstitutional. Those expenditures include the unrestricted purchase of instructional materials and equipment and transportation for field trips.

The General Assembly amended Ohio's statutes after the *Wolman v. Walter* decision to prohibit the invalidated expenditures.

Public aid to private schools

The following chart summarizes the status of state aid to private schools in the 50 states.

Explanation of terms

○ indicates states with no significant aid for private schools.

● indicates states with significant aid for private schools.

Textbooks loans/purchases – States that allow private schools the same access to textbooks as public schools.

Transportation – States that provide transportation for private school students on routes and distances comparable to transportation for public school students. "Permissible" means that transportation for private school students in a comparable manner is authorized but not required.

Auxiliary services – States that provide one or more of the following services to private schools: student health screenings, teacher internship programs, driver's education, standardized testing, dropout prevention programs, guidance counseling, speech and hearing programs, remedial programs, instructional materials.

state		*textbook loans/ purchases*	*transportation*	*auxiliary services*	*constitutional prohibition on public aid*
Alabama	○				yes
Alaska			*yes*		*yes*
Arizona	○				yes
Arkansas	○				*yes*
California			yes	yes	yes
Colorado				*yes*	*yes*
Connecticut		yes	yes	yes	yes
Delaware			*yes*	*yes*	*yes*
Florida				yes	yes
Georgia	○				*yes*
Hawaii	○				yes
Idaho	○		*ruled unconstitutional*		*yes*
Illinois	●	yes	yes	yes	yes
Indiana		*yes*	*yes*	*yes*	*yes*
Iowa		yes	yes		
Kansas			*yes*	*yes*	*yes*

state		*textbook loans/ purchases*	*transportation*	*auxiliary services*	*constitutional prohibition on public aid*
Kentucky				yes	yes
Louisiana		*yes*	*yes*	*yes*	
Maine		yes	permissible	yes	
Maryland				*yes*	
Massachusetts			yes	yes	yes
Michigan			*permissible*	*yes*	*yes*
Minnesota	●	yes	yes	yes	
Mississippi		*yes*			*yes*
Missouri				yes	yes
Montana			*permissible*		
Nebraska		yes	yes	yes	yes
Nevada			*permissible*		
New Hampshire		yes	permissible	yes	yes
New Jersey	●	*yes*	*yes*	*yes*	
New Mexico		yes			yes
New York	●	*yes*	*yes*	*yes*	*yes*
North Carolina				yes	
North Dakota			*permissible*		
Ohio	●	**yes**	**yes**	**yes**	**yes**
Oklahoma	○				*yes*
Oregon			yes	yes	yes
Pennsylvania	●	*yes*	*yes*	*yes*	*yes*
Rhode Island		yes	yes		
South Carolina	○				*yes*
South Dakota	○				
Tennessee				*yes*	
Texas		yes		yes	yes
Utah	○				*yes*
Vermont				yes	
Virginia	○				*yes*
Washington			permissible	yes	
West Virginia		*yes*	*yes*	*yes*	
Wisconsin			yes	yes	yes
Wyoming	○				*yes*

Unusual provisions

Alaska – Private school students may participate in public school district classes and extracurricular activities, at the discretion of the local school board.

Minnesota – State law allows income tax deductions of up to $650 for each grade K-6 dependent and up to $1,000 for each grade 7-12 dependent who attends public or nonpublic school. Allowable expenses include tuition, textbooks and transportation costs.

Ohio – The Cleveland Scholarship Program, which began in the 1996-97 school year, provides $5 million in tuition payments for K–3 students from low-income families residing in the Cleveland City School District. The payments may be used for tuition at sectarian and nonsectarian private elementary schools in Cleveland.

Wisconsin – The Milwaukee Parental Choice Program provides state tuition aid for low-income students living in the city to attend nonsectarian private schools. The program is limited to 1.5% of Milwaukee's student enrollment.

Source: The Regulation of Private Schools in America: A State-by-State Analysis. Office of Nonpublic Education. U.S. Department of Education; and Public School Finance Programs of the United States and Canada. American Education Finance Association and Center for the Study of the States. The Nelson A. Rockefeller Institute of Government, State University of New York, 1995.

The unlevel playing field: How the rules differ for Ohio's public and private schools

Free education for all students

Public schools	Private schools
Free schools The Ohio General Assembly must provide for the organization, administration and control of the public school system of the state, which must be supported by public funds and must be available free to residents of a school district. Ohio Constitution, Article VI, Section 3.	Chartered and registered private schools may charge tuition for admission and have no legal obligation to enroll children from any geographical area.
Admission Public schools must accept for enrollment any child who has attained the age of eligibility and who is a resident of the district. ORC 3313.48, 3313.64.	Chartered and registered private schools have no legal obligation to accept any children. They may adopt any admissions requirements they wish, subject to Ohio and federal civil rights laws.

Special education

Required for eligible students Public schools must provide special education services for all children in their district who qualify under state and federal guidelines, regardless of cost. 20 USC 1401, et seq.	Chartered and registered private schools are not required to provide special education services. Private school students who qualify for services receive them from the public school district in which they reside, or at that public district's expense.
Identification and placement Public school districts must adhere to specific due process procedures in identifying, placing and determining services for special education students. Their decisions can be challenged in court. Services for special education students can be mandated regardless of cost or impact on other students. 20 USC 1401, et seq.	These mandates do not apply to chartered or registered private schools.
Least restrictive environment Special education students must be educated in the "least restrictive environment." This means that they are placed in regular classrooms in a school unless other placements are determined to be more appropriate. 20 USC 1412 (5) (B).	This mandate does not apply to chartered or registered private schools.

Health and social services

Child abuse prevention Each city and exempted village public school district and each educational service center is required to develop and provide an in-service program in child abuse prevention for its elementary school teachers and administrators. ORC 3319.073.	This mandate does not apply to chartered or registered private schools.

Absent children Each public school must notify the parents of an absent student "within a reasonable time after the determination that the student is absent from school." ORC 3313.205.	This mandate does not apply to chartered or registered private schools.
Breakfast programs School buildings in public school districts must establish breakfast programs for students if at least 33% of its students are eligible for free breakfasts under federal law. ORC 3313.813 (A).	This mandate does not apply to chartered or registered private schools.
Immunizations Public school districts are required to arrange immunizations against mumps, polio, diphtheria, pertussis, tetanus, rubeola, and rubella for students, if the immunizations are not provided by the students' parents. ORC 3313.671.	This mandate applies to chartered private schools but not to registered private schools.
Tobacco sanctions Each public school board must adopt a policy establishing sanctions against students for the use of tobacco in school buildings or at school-supervised activities. ORC 3313.751.	This mandate does not apply to chartered or registered private schools.
Criminal record checks Each public school district must conduct a criminal records check for every job applicant who has come under final consideration for employment and who is "responsible for the care or custody or control of a child." ORC 3319.39 (A) (1).	This mandate applies to chartered private schools but not to registered private schools.

Instruction, curriculum and textbooks

Minimum hours Public school students in grades 7-12 must be in class at least $5\frac{1}{2}$ hours each day, excluding interscholastic athletics and lunch period. OAC 3301-35 (B) (12).	Students in grades 7-12 in chartered private schools must be in class 5 hours each day. OAC 3301-35-04 (A) and (B).
Gifted children Each public city, local and exempted village school board must adopt policies for the identification of gifted children. ORC 3313.21.	This mandate does not apply to chartered or registered private schools.
Home instruction Public school districts must monitor and assess the educational progress of students within their districts receiving home instruction. OAC 3301-34-03.	This mandate does not apply to chartered or registered private schools.

Vocational education Public school boards are required to provide vocational education programs for the pupils enrolled in their districts. ORC 3313.90.	This mandate does not apply to chartered or registered registered private schools. Vocational students in chartered private schools must be permitted to attend programs operated by public school districts. ORC 3313.90.
Teacher-pupil ratio In public school districts, the ratio of teachers to pupils on a districtwide basis must be at least one full-time equivalent classroom teacher for every 25 pupils. OAC 3301-35-03 (A) (3).	This mandate does not apply to chartered or registered private schools. OAC 3301-35-04 (C) and 3301-35-08.
Service personnel In public school districts, a minimum of five full-time equivalent educational service personnel (guidance counselors, librarians, nurses, and elementary school art, music and phys/ed teachers) must be employed for every 1,000 pupils. OAC 3301-35-03 (A) (4).	This mandate does not apply to chartered or registered private schools. OAC 3301-35-03 (C) and 3301-35-08.
Library expenditures In public school districts, at least one-half of 1% of annual general fund expenditures must be spent for library materials and equipment. OAC 3301-35-04 (B) (2) (d).	This mandate does not apply to chartered or registered private schools. OAC 3301-35-04 (D) and 3301-35-08.
Free textbooks Public boards of education are required to provide free textbooks to all pupils enrolled in their districts. ORC 3329.06.	This mandate does not apply to chartered or registered private schools. Public schools are required to offer textbooks to private school students enrolled within their districts.

Transportation

For public school students School boards of city, exempted village and local districts must provide transportation to and from school for all pupils in grades K-8 who reside in their districts and who live more than two miles from school. ORC 3327.01.	This mandate does not apply to chartered or registered private schools.
For private school students School boards of city, exempted village and local school districts must provide transportation for pupils in grades K-8 who attend private schools that comply with state minimum standards, if the travel time from the pickup point to the school does not exceed 30 minutes. ORC 3327.01.	The costs of transporting pupils in grades K-8 in private schools are borne by the public school districts in which the pupils reside. ORC 3327.01.

Student rights

Due process

Public school boards must provide due process hearings for students before they are suspended, expelled, or permanently excluded from school. ORC 3313.66.

This mandate does not apply to chartered or registered private schools.

Student expression

The United States Constitution places limits on the ability of public school boards to regulate student expression. Students are not required to shed their constitutional rights at the schoolhouse door. *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1969).

Chartered and registered private schools are not considered part of government and therefore have greater ability to regulate student expression.

Corporal punishment

Corporal punishment of students has been banned in Ohio public schools since September 1, 1994, except in cases where a school board votes to retain the practice. If corporal punishment is retained by a public school district, it may only be inflicted when reasonably necessary to preserve discipline. ORC 3319.41.

The ban on corporal punishment of students does not apply to chartered or registered private schools.

Employee rights, salaries and benefits

Teacher minimum salaries

Public school teachers are paid in accordance with the minimum salary schedule established in state law or in accordance with negotiated schedules above the minimum amounts. ORC 3317.13.

Private school teachers are not paid in accordance with a minimum salary schedule established by state law.

Teacher tenure

Public school teachers have the ability under state law to achieve continuing contract status, or tenure. ORC 3319.08.

This benefit does not apply to teachers in chartered or registered private schools.

Teacher due process

Public school teachers who have attained tenure have a constitutional right to due process before their employment may be terminated. Their employment may be terminated only if specific statutory violations are proved by the school board. ORC 3319.16, 3319.161.

This benefit does not apply to teachers in chartered or registered private schools.

Teacher evaluations

Public schools teachers who do not have have tenure are entitled to evaluations, a statement of reasons for dismissal, and a hearing with the school board before the nonrenewal of their contracts. ORC 3319.11 and 3319.111.

These benefits do not apply to teachers in chartered or registered private schools.

Administrator evaluations

Public school boards must adopt procedures for the evaluation of all assistant superintendents, principals, assistant principals and other administrators. ORC 3319.02.

This benefit does not apply to administrators in chartered or registered private schools.

Nonteacher salaries

Nonteaching personnel in public schools are paid in accordance with a salary schedule adopted by the school board. The schedule is based upon training, experience and qualifications. ORC 3317.01.

This benefit does not apply to nonteaching personnel in chartered or registered private schools.

Supplemental contracts

Public school boards are required to issue written supplemental contracts for teachers and the nonteaching personnel who receive additional compensation for duties that are in addition to their regular duties. ORC 3319.08, 3313.53.

Chartered and registered private schools may assign supplemental duties to teachers or other employees without granting additional compensation for supplemental duties.

Retirement benefits

Public school teaching and nonteaching personnel receive retirement benefits from the State Teachers Retirement System (STRS),and School Employees Retirement System (SERS), respectively. Public school boards contribute 14% of each employee's gross annual salary to either STRS or SERS. ORC Chapters 3307 and 3309.

Chartered and registered private schools have no obligation under law to fund retirement benefits for their teaching or nonteaching personnel.

Civil Rights Act

Public school employees are protected by the Ohio Civil Rights Act, the most comprehensive remedy for employment discrimination under Ohio law. ORC Chapter 4112.

Employees of chartered and registered private schools are not protected by the Ohio Civil Rights Act.

Safety and health

Public school employees are protected by Ohio's Occupational Safety and Health Act, which requires school districts and other public employers to comply with uniform workplace health and safety standards. ORC Chapter 4167.

Employees of chartered and registered private schools are not protected by Ohio's Occupational Safety and Health Act.

Collective bargaining

Bargaining required

Public school boards are required under Ohio law to extend recognition to the designated representative of their employees and to engage in good-faith collective bargaining with the representative. ORC Chapter 4117.

Chartered and registered private schools are not required to negotiate with designated representatives of their employees.

SERB jurisdiction

Public school boards are under the jurisdiction of the State Employment Relations Board (SERB), an agency created to administer Ohio's collective bargaining law. ORC Chapter 4117.

Chartered and registered private schools are not under the jurisdiction of SERB.

Unfair labor practices prohibited

Public school boards are prohibited by law from engaging in unfair labor practices under Ohio's collective bargaining law. SERB is required to investigate all charges of unfair labor practices and, if it finds probable cause, conduct a hearing. ORC 4117.12 (B).

This prohibition does not apply to chartered or registered private schools.

Right to strike

Employees of public school districts have the right to strike after contract talks have failed. ORC 4117.14 (D) (2).

Employees of chartered and registered private schools do not have the right to strikeunder Ohio's collective bargaining law.

Financial operation

State oversight

Public school financial operations are established, controlled and limited by the state. ORC Titles 33 and 57.

Chartered and registered private schools operate without state financial controls.

Voter approval

Public school boards must receive voter approval before issuing general obligation bonds for building construction and renovation. ORC 5705.21.

Private schools may borrow money for building construction and renovation without voter approval.

Prevailing wages

Building construction projects in public school districts are subject to Ohio's Prevailing Wage Law if the overall cost of the project exceeds $50,000. ORC 4115.03 (B).

Building construction projects for chartered and registered private schools are not subject to Ohio's Prevailing Wage Law.

Competitive bidding

Public school boards are required to follow competitive bidding procedures for construction and repair projects with costs exceeding $25,000 and for all purchases of school buses. ORC 3313.46, 3327.08.

Chartered and registered private schools are not subject to competitive bidding statutes.

Disposal of property

When disposing of real or personal property exceeding $10,000 in value, public school boards must sell the property at public auction ORC 3313.41.

Chartered and registered private schools are not required by state law to sell property at public auction.

Debt limitations

The Ohio General Assembly has prescribed specific debt limitations for public school districts which may not, except in specified circumstances, be exceeded by public school boards. ORC 133.06.

Chartered and registered private schools are not required by law to operate within prescribed debt limitations.

Closing schools prohibited Public school boards districts are barred by Ohio law from closing schools or delaying the opening of schools if they do not have the funds to operate. ORC 3313.483.	Chartered and private schools are not barred from closing if they do not have the funds to operate.
Open records All records kept by a public school district, unless excepted under state or federal law, must be open to the to the public at all reasonable times for inspection. ORC 149.43.	Records kept by a chartered or registered private school are not required to be available for public for public inspection.
Financial disclosure statements Superintendents, treasurers and business managers in all public school districts, as well as board members in districts with average daily memberships of 12,000 or more, must file annual financial disclosure statements with the Ohio Ethics Commission. ORC 102.02, 102.022.	Neither administrators nor members of governing entities of chartered or registered private schools must file annual financial disclosure statements.

Governance structure

Grant of authority Public school boards are created by the Ohio General Assembly and have only the authority that has been expressly provided to them, or any implied authority that is reasonably necessary to carry out express powers.	Chartered and registered private schools may take any action that is not prohibited by local ordinances or state and federal laws.
Open meeting Public school boards must hold regular meetings at least once every two months. All board meetings are subject to Ohio's Open Meetings Law. ORC 121.22, 3313.15.	Governing entities of chartered and registered private schools are not required to conduct regular meetings and are not subject to Ohio's Open Meetings Law.
Minutes required Minutes of all regular and special meetings of public school boards must be promptly prepared and open to public inspection. ORC 121.22.	Governing entities of chartered and registered private schools are not required to prepare minutes of their meetings or to make them available for public inspection.
Election laws Candidates for public school boards must adhere to Ohio election and political action committee laws when running for election. ORC Chapter 3517.	Candidates for governing entities of chartered and registered private schools are not subject to Ohio's election and political action committee laws.
Ethics laws Public school board members are subject to the Ohio Ethics Law, the criminal statute dealing with unlawful interests in public contracts and the conflict-of-interest statute for school board members. ORC Chapter 102, ORC 2921.42, ORC 3313.33.	Members of governing entities of chartered and registered private schools are not subject to ORC Chapter 102, ORC 2921.42 or ORC 3313.33.

References

Baker, Robert T. and Kimball H. Carey. *Baker's 1995-96 Handbook of Ohio School Law.* Anderson Publishing Company, 1995.

Broughman, Stephen. *Private School Universe Survey, 1993-94.* National Center for Education Statistics, U.S. Department of Education, 1996.

Condition of Education, 1996. The. National Center for Education Statistics, U.S. Department of Education, 1996.

Different Rules: The Myth of Competition Between Public and Private Schools in Kansas. Kansas Association of School Boards, 1996.

Gold, Steven D., David M. Smith and Stephen B. Lawton. *Public School Finance Programs of the United States and Canada.* 2 volumes. American Education Finance Association and Center for the Study of the States, The Nelson A. Rockefeller Institute of Government, State University of New York, 1995.

Johnson, Jean. *Assignment Incomplete: The Unfinished Business of Education Reform.* Public Agenda, 1995.

Johnson, Jean and John Immerwahr. *First Things First: What Americans Expect from the Public Schools.* Public Agenda, 1994.

Ohio Educational Directory, 1995-96 School Year. Ohio Department of Education, 1995.

Oplinger, Doug and Dennis J. Willard. "Rivals for Dollars," *Akron Beacon-Journal,* July 21, 1996, pages A1, A10, A11.

Russell, Warren. *Administration Guide to Amended Substitute House Bill 152.* Buckeye Association of School Administrators, 1993.

Russell, Warren. *House Bill 117: Budget Analysis and Discussion, Fiscal Years 1996-1997.* Ohio School Boards Association, 1995.

Williams, Patricia A. *The Regulation of Private Schools In America: A State-by-State Analysis.* Office of Nonpublic Education, U.S. Department of Education.

Acknowledgments

Thank you to the persons listed below who provided information and support during the production of this report:

Robin Charles, Education Information Center.
Marina Davis, principal, Dublin Scioto High School.
Betty Drummond, Ohio Department of Education.
Scott Ebright, Ohio School Boards Association.
Ada Facemyer, John M. Ashbrook Center for Public Affairs, Ashland University.
Susan Klar, Ohio Legislative Service Commission.
Jack Klenk, U.S. Department of Education.
Jim Landers, Ohio Legislative Service Commission.
Christine Minx, Ohio School Boards Association.
Chris Mohr, treasurer, Dublin City Schools.
Warren Russell, Ohio School Boards Association.
Daria Shams, Ohio Department of Education.
Deborah Zadzi, Ohio Legislative Budget Office.

SEARCHING FOR A "LEVEL PLAYING FIELD": SOME OBSERVATIONS ABOUT ARIZONA'S MARKET-BASED EDUCATION SYSTEM

Tom Pickrell[*]
Mesa Public Schools, Arizona
October, 2001

The Level Playing Field Imperative

During the 1990s, Arizona's urban areas made a dramatic transition toward a market-based education system, meaning a collection of schools—public, private and home schools—that form a competitive market for students. Similar education markets are developing in the metropolitan areas of other states.

A market-based education system presupposes that all schools compete on a "level playing field." If some, but not all, schools must comply with regulations that make the cost of their services more expensive or otherwise prevent them from adapting to better recruit students, the schools bearing the greater regulatory burden are at a competitive disadvantage.

From an economic perspective, a market operates more efficiently and produces greater benefits for consumers if all competitors must play by the same rules. In the education arena, the level playing field as a necessity for fair competition also has much common sense appeal. Advocates for public schools have used the need for a level playing field as an argument to defeat legislative proposals for private school vouchers. Where the transition to a market-based system has already begun, the argument is also used by public school advocates to seek more freedom from state and federal regulation.

With all of the discussion about the level playing field as an economic imperative, it is fair to ask—what would a level playing field look like in a market-based education system? And how likely is it that a level playing field will ever come to pass?

Arizona's Education Market

The schools that form the education market fall into four categories: the district school, the charter school, the private school and the home school.

1. District Schools

Arizona's school districts were formed to fulfill a constitutional duty to create a general and uniform system of schools that offers all children a free and equal education opportunity. In the greater Phoenix metropolis, 47 school districts enroll 505,000 students who attend more than 500 schools.

---

[*] Tom Pickrell is general counsel of Mesa Public Schools, Arizona, and a member of the NSBA Council of School Attorneys Board of Directors. His views should not be attributed to Mesa Public Schools or the NSBA Council of School Attorneys.

The vast majority of district schools are comprehensive elementary, junior and senior high schools designed to serve the students who reside within a specified attendance area. The larger districts offer alternative schools for students with academic or behavioral problems that disqualify them from attending their neighborhood school. Some also have created "back-to-basics" schools for parents who want the school that their children attend to focus more time on the core academic subjects.

Prior to 1995, parents intent on enrolling their child in a public school could send the child only to the school in the attendance area in which they lived. In 1995, the legislature enacted open enrollment legislation.[1] Today, parents retain the unqualified right to enroll their child in their neighborhood school but also may apply for admission to any other public school in or out of the school district. A district school must admit applicants for open enrollment to the extent the school has excess capacity for such students.

2. Charter Schools

Since 1995, Arizona law has authorized the formation of charter schools.[2] Private individuals and organizations may establish a charter school by applying for sponsorship from any school district, the State Board of Education or the newly established State Board for Charter Schools.

Each charter school is based upon a contractual agreement or "charter" between the school's operator and its government sponsor as to what the school will be expected to achieve in exchange for public funding. In the charter, the school must commit to a curriculum and method of assessment. In addition, the operator must covenant to comply with state education laws relating to health, safety, civil rights, finance and insurance.

Charter schools' admissions procedures are similar to the open enrollment laws applicable to district schools. Charter schools must enroll all qualified students to their enrollment capacity and cannot use discriminatory admissions criteria. Charter schools cannot charge their students for their educational services.

Each year, a substantial number of charter school students return to district schools for a variety of reasons. The question of how to credit these students for their course work has generated controversy. Parents and charter school operators claim that district schools that refuse to give such students full credit for their charter school course work are discriminating against them because of their charter school attendance, while district school officials claim that the number of credits that students amass in charter schools calls into question the worth of such credits and suggests that the charter schools are operating like "diploma mills." The legislature recently attempted to resolve this debate by allowing school districts to develop their own standards for acceptance of credits from other schools, but requiring that the adopted standards apply equally to credits awarded by public, private and charter schools.[3]

---

[1] A.R.S. §15-816, et seq.

[2] A.R.S. §15-181, et seq.

Arizona's laws, particularly those allowing multiple sponsors, are highly conducive to the formation of charter schools. Indeed, more than 20 percent of all charter schools in the nation are located in Arizona. Early entrants to the charter school field were local entrepreneurs with a pent-up desire to operate a school. More recently, private school companies seeking to operate multiple campuses have entered the market. One such operator, the Tesseract Group, opened multiple campuses but was forced to liquidate its holdings in a high-profile bankruptcy. Today, 115 charter schools enroll 33,000 students who attend school at more than 220 campuses in greater Phoenix.

3. Private Schools

Private schools have a long history in Arizona, but their numbers and total enrollment have not been as substantial as private schools in other areas of the nation. The largest private school system in the greater Phoenix area consists of the parochial schools operated by the Catholic Diocese. Private schools in the greater Phoenix area have an estimated enrollment of 12,000 students. Private schools' market share has fallen considerably with the advent of charter schools—not because their students are leaving to attend charter schools, but because a substantial number of nonsectarian private schools converted to charter schools.

In 1998, private schools received a major financial boost when the legislature enacted and the Arizona Supreme Court upheld a $500 private school tuition tax credit. The law authorizes private school tuition organizations to form for the purpose of funding private school tuition from donations backed by a dollar-for-dollar credit against the donor's state income tax obligation. Schools accepting tax credit-backed tuition payments cannot discriminate against students on the basis of their race, national origin or disability. The law is silent with regard to discrimination on the basis of religion and gender.

State law expressly forbids the State Board of Education from regulating private schools.[4] Accordingly, such schools are exempt from teacher certification requirements and the state's academic standards and assessments. Their employees have no right to continued employment unless so provided in a written employment contract.

4. Home Schools

Arizona law allows parents to home school their children with very little governmental oversight. Home-schooling parents need only register their intent to home school their children with the county school superintendent.[5] Home-schooled students were once required to participate in state assessments, but that practice has been eliminated.[6]

---

[3] A.R.S. §15-189.03

[4] A.R.S. §15-161

Arizona's policies toward home schooling have become so "hands off" that the true number of home-schooled children in the state or county is unknown. There are 7,000 registered home-schooled students in the greater Phoenix area, but the obligation to register is not well known and the penalties for failing to register are negligible. Hence, the real number of home-schooled students is probably substantially greater than 7,000.

Whatever the real number may be, it has grown significantly over the 1990s. The capacity of parents to home school their children has been assisted considerably by the rise of the personal computer, with its vast array of educational programs for home-schooled students, and more recently the Internet, with a variety of companies offering educational services online.

The Level Playing Field from the Players' Perspectives

Within each of the schools that compete in the education market, there are players: consumers, labor and management. Parents (and their children) are, of course, the consumers; teachers and support staff are labor; and governing boards, administrators and other policy makers are management. Each player has a different view of the level playing field imperative.

1. Parents and Students

A market-based education system is, of course, intended to benefit the parent (and student) as the consumer. Parents' foremost desire, presumably, is access to the school that will provide what they believe is the best education opportunity suited to their child. Accordingly, from the perspective of parents as consumers, desired leveling measures would be those that promote equal education opportunity in the education market. Such measures might include private school vouchers, home schooling tax credits, free transportation and rigorous enforcement of anti-discrimination laws. Surveys suggest, however, that many parents would gladly forego these options if their neighborhood schools were more responsive to their concerns about school and class size, student safety and discipline and academic standards.

With regard to such leveling measures, there often is an awkward silence from the non-parent advocates for a market-based education system. Voucher proposals abound, but the dollar amounts discussed are invariably substantially less than the full tuition amount charged by private schools. Proposals to prohibit discrimination against certain classes of students by private schools are also problematic. Private schools generally agree that schools that accept public funds should serve all students, regardless of their race or ethnicity. However, the idea that students should be protected from discrimination on the basis of religion, sex, disability or English proficiency is strongly resisted by some private schools as a governmental intrusion that would undermine their success.

---

[5] A.R.S. §15-803

[6] A.R.S. §15-745

Extending the voucher concept to include reimbursement of home-schooling costs has never received serious consideration, perhaps because the idea of paying someone for foregoing a government benefit is politically difficult. Home-schooling parents, however, have made significant progress in other areas. District schools can and do enroll home-schooled students as part-time students, thereby enabling them to take courses in subjects that cannot be learned satisfactorily at home.[7] Home-schooled students are also entitled to "try-out" for athletic and other interscholastic teams of district schools,[8] and they recently received legislative authorization to receive special education services from district schools to the same extent as students of private schools.

Student transportation in a market-based education system is one area that has made slow progress for parents, but the policy remains inconsistent. For the purpose of facilitating open enrollment, district schools may transport students from adjoining districts up to twenty miles each way and receive reimbursement. A few districts that face declining enrollments are offering transportation to encourage parents to send their children to district schools. Most districts, however, do not offer transportation outside of their boundaries. Charter schools receive a subsidy that includes the expected cost of transporting students; however, the school receives the subsidy whether or not a student is transported. Some offer transportation, but most require their parents to provide transportation and pocket the subsidy. Free transportation for students attending private schools has not been proposed.

2. Teachers

Teachers teach for many reasons. For some, it may be an avocation; for others, it may be just a living. Interviews of teachers probably would reveal a variety of views about the necessity of a level playing field among competing schools, all of which would be influenced to some extent by their motives for teaching. Only with the foregoing caveat can the views of the largest teachers' unions, the National Education Association (NEA) and American Federation of Teachers (AFT), be used as a proxy for teachers' perspective on the level playing field issue.

The NEA and AFT clearly wish to avoid the emergence of market-based education systems and are willing to spend great amounts of money to lobby and campaign against them. Arizona's market-based system is a threat to the local teacher unions for several reasons:

First, the market-based education system creates many more employers. Whereas there were only 56 employers of public school teachers in greater Phoenix prior to the 1990s, now there are hundreds of employers—far too many for the unions to organize and efficiently represent. Teachers and other school employees are presently unorganized in charter and private schools.

---

[7] A.R.S §15-901.A(2)(a)

[8] A.R.S. §15-802.01

Second, the market-based system allows more non-licensed teachers to compete for teaching positions sought by union members. Charter, private and home schools have no licensure requirements for teachers or administrators. Many more people are teaching who previously would have been unqualified to teach before the market-based education system arrived. Adding more applicants for teaching positions reduces pressure to increase teacher salaries and benefits.

Finally, the market-based system, which allows many of its schools to operate free of regulations that protect licensed teachers with tenure and other employment laws, brings into question the value of such regulations, all of which are the product of legislative advocacy by the teacher unions. The market-based system, therefore, threatens to erode many of the employment protections that are valued by union members.

Obviously, the level playing field imperative could lead to less regulation of public schools or greater regulation of private and charter schools. When working collectively, teachers are most likely to favor increased regulation of the teaching profession as the best means of leveling their playing field. Thus far, however, the market's emergence has probably reduced the net amount of education regulation.

3. School Management

The school management players represent the interests of their schools. No doubt many school managers firmly believe that they look out for their students' interests because their schools' mission is to serve students. They are probably right. However, a commitment to a group of students should be distinguished from the interests of all students as consumers. The competitive forces generated by a market-based education system may prevent school managers from letting their schools serve the collective interest of parents and students in equal education opportunity.

In a market-based education system, the schools that depend upon public funds to cover their costs operate under special financial constraints. Like most states, Arizona allocates money to district and charter schools on a per-pupil basis. Each enrolled pupil generates a based amount. Some categories of students who are more expensive to teach—such as students with disabilities and students with limited English proficiency—receive a "weight" or additional dollar amount.

What every school manager knows, however, is that the additional weights do not fully compensate for the additional costs of serving such students. School managers also must deal with the preferences and expectations of the parents of their students. Most parents are well aware that the special needs of some students may slow or disrupt the academic progress of their children. Some parents, acting on more ignoble motives, will seek to send their children to schools with students of the same economic background, the same religion or same ethnicity. The combination of these financial and political realities creates significant pressure on school managers to focus their recruitment efforts on the students who are the easiest and least costly to serve, or at least the most compatible with the school's current student population. These pressures can only be greater for those school managers who own and operate their schools for profit.

These pressures are by no means confined to charter and private schools. Under open enrollment, every school district fears the out-of-district, profoundly disabled student who wishes to use open enrollment to transfer to one of their schools in search of better services. In this case, the finance system allows the financial burden to shift completely to the receiving school district. As a result, school districts often seek to avoid such transfers, claiming lack of capacity at the desired school.

In sum, school managers must act in the best interest of their schools, which in most instances will depend heavily, first, upon a steady supply of student applicants and, second, upon enrollment of only students whose costs are not excessive and who do not drive away other students. No doubt many school managers can and do seek to operate their school in ways that serve the goal of equal education opportunity, but imperatives of the market inevitably will force school managers to discard or shun some students for the sake of their school's prosperity.

Leveling through Litigation

Will the market-based education system spawn new legal claims as the competition among schools intensifies and the players—particularly, teachers and students—seek to better their position within the market place? Actually, a variety of claims can be characterized as "leveling litigation" in preparation for or in response to a market-based education system.

1. School Finance Equalization

Since the 1970s, school finance systems of states throughout the country have been challenged as being unequal or discriminatory. The overarching theme of such litigation has been that, for the sake of equity among school districts, school funding must become more of a state responsibility and less of a local responsibility. Where such litigation has been successful, the once prevalent model whereby school districts levied local property taxes to meet locally determined school budgets has given way to state finance formulas that prescribe spending limits for school districts and combine state and local tax revenues to either equalize funding among them or at least assure that all are funded to a level of adequacy.

Arizona is one such state that has had its school finance system shaped by such litigation. In *Shofshall v. Hollins*,[9] the Arizona Supreme Court rejected an equal protection challenge based on the State Constitution's requirement that the legislature create and maintain a general and uniform system of public schools. Eight years later, however, in response to a threat of a referendum, the legislature equalized its system of financing school districts' operations by capping school operations budgets and using state funds to aid districts that could not finance their schools' funding needs without excessive property tax rates.

---

[9] 515 P.2d 550 (Ariz. 1973).

The finance reforms of 1980 had little effect on the financing of school facility construction. School districts had to depend largely upon voter-approved and locally financed bond programs to finance school construction. Since the ability of a school district to build and renovate schools depended upon local property wealth and voter willingness to be taxed, school facilities varied widely throughout the state.

In 1995, the school finance system was challenged again, this time focusing on inequality among school facilities.[10] The Arizona Supreme Court ruled that the state's school finance system violated the general and uniform school requirement because the legislature failed to ensure that all school districts had sufficient funds to achieve a predetermined level of facility adequacy. Faced with the question of a remedy, the legislature debated the degree to which the state should assume control over the location, construction and financing of new school construction. Ultimately, the legislature chose to establish a new state agency that would approve and fund all new school construction of district schools.

By the time of the ruling, however, the Arizona legislature had authorized formation of charter schools, and the growth of such schools was explosive. The system of financing charter schools provided a sharp contrast to the finance system declared unconstitutional because such schools receive a lump sum per pupil without requirements that any particular portion be spent on operations or on capital items. Proponents of a market-based education system, among them the then Superintendent of Public Instruction Lisa Keegan, argued that the school finance system should be more fundamentally reformed to heighten competition among public schools. Specifically, it was proposed that all students enrolled in district and charter schools carry with them a dollar amount calculated to cover operations and capital costs, and payable to the school that enrolls them. The dollar amount would be paid to the student's school, rather that the school district, in increments over the school year. If the student remained enrolled at one school, the school would eventually receive the full amount. If a student transferred to another school, funding for the student would end at the first school and transfer with the student to the second school.

This proposal for radical reform of Arizona's school finance system ultimately failed because its implementation was problematic and it was more of a solution than the problem required. Funding that follows the student, however, remains the vision of those who seek a fully functioning market-based education system. Such proposals are sure to surface in other states that debate reforms of their school finance systems.

---

[10] *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806 (Ariz. 1994); *Hull v. Albrecht*, 950 P.2d 1141 (Ariz. 1997); *Hull v. Albrecht*, 960 P.2d 634 (Ariz., 1998).

2. Private School Tuition Tax Credits

In 1998, the Arizona legislature enacted a tax credit of up to $500 for state income taxpayers who make contributions to a valid private school tuition organization that provides scholarship for students who attend private schools.[11] The program was promptly challenged as an unlawful state expenditure for private and religious schools in violation of the state and federal constitutions. The Arizona Supreme Court upheld the legislation, and the U.S. Supreme Court declined to review the matter.[12]

Arizona's tuition tax credit program should be viewed as a variant of the private school tuition voucher programs enacted by the Wisconsin, Ohio and Florida legislatures. Designed by the American Institute for Justice for enactment in any state with an income tax, the legislation is designed to withstand challenges based upon states' constitutions that are more clear and forceful than the U.S. Constitution's Establishment Clause in prohibiting expenditures of state funds for private schools or religious purposes. Among the program's features that helped insulate it from constitutional challenge were that: (1) an income tax credit entails no disbursal of money from the state treasury and (2) the money that ultimately finds its way to a private school is directed by a choice made by parents of a student, rather than the state.

A tax credit program like that approved in Arizona may be the future mode of state support for private and religious schools. The tax credit was recently increased to $625 for joint tax return and has produced $31 million for private schools over two years. Ironically, such a program is disequalizing among schools in a market-based education system. A credit program does not assure all private school students equal access, or even an equal sum, for tuition expenses and places tuition decisions into the hands of private organizations that, in many cases, are controlled by private schools that discriminate against students on the basis of their religion, gender, disability and English language proficiency. A credit program also leaves private schools essentially unregulated, allowing them the competitive advantage of being allowed to operate without the regulations applicable to public schools.

3. Charter Schools as Public Schools

The constitutionality of state legislation authorizing the formation of charter schools and the operation of charter schools by private individuals and entities has been challenged in numerous states.[13] Such litigation is clearly designed to head off the formation of a market-based education system. All such claims have been unsuccessful thus far. Various court opinions rendered on this issue may provide helpful guidance in determining what directions a legislature can and cannot go in future attempts to develop a market-based education system.

---

[11] A.R.S. §43-1089

[12] *Kotterman v. Killian*, 972 P.2d 606 (Ariz.), *cert. denied sub nom., Rhodes v. Killian*, 528 U.S. 921 (1999).

[13] *See, e.g., Utah Sch. Bds. Ass'n v. Utah State Bd. of Educ.*, 17 P.3d 1125 (Utah 2001); *In re Grant of Charter Sch. Appl.*, 753 A.2d 687 (N.J. 2000); *Wilson v. State Bd. of Educ.*, 89 Cal. Rptr. 2d 745 (Cal. App. 1999); *Council of Orgs. & Others for Educ. About Parochiaid v. Governor*, 566 N.W.2d 208 (Mich. 1997).

No challenge has been made to Arizona's charter school legislation, but the program is vulnerable to a constitutional challenge based on the fact that, while charter schools are public schools, the legislature has exempted them from compliance with the state facility standards and participation in the state capital finance program.

4. Home-schooled Students' Access to District Schools' Services

Arizona enacted legislation to resolve the competing interests of home-schooled students and those enrolled in district schools with regard to the questions of home-schooled students' right to participate in courses offered by district schools, to join athletic teams and in other interscholastic activities sponsored by district schools, and to receive special education services. Elsewhere such issues have been litigated. Courts have consistently ruled that, absent specific legislation, home-schoolers have no right to enroll in courses offered by district schools or to participate as members of a district school's athletic team. With regard to home-schoolers' right to special education services, their eligibility hinges on whether, under their state's laws, home-schooled students are regarded as private school students.[14] Where so classified, a home-schooled student is eligible for services on the same terms and conditions as a private school student.

A Final Thought about Standards and Markets

What is the relationship, if any, between the movement toward high academic standards and the push for development of market based education systems? It may be that there really is none, that the former is the Democrats' answer to public education reform and the latter is the Republicans'. On the other hand, some of the most conservative education reformers—the ones clamoring for vouchers— are also proponents of rigorous standards for public schools, backed by high stakes testing.

It is a fair question to ask why market reformers would also want high standards. If a market–based education system is designed to force schools to improve through competition, why would a set of rigorous standards reinforced with graduation tests be necessary? And why would the standards be applicable only to public schools in the educational market? Perhaps the widespread demand for higher standards and testing implies a lack of confidence that market competition will measurably improve public schools.

Actually, the conservatives' support for standards and market reforms may signal another, more important reality about public education reform. That reality is that parents may not wish to reform their schools in ways that will lead to a collective improvement in academic achievement. This concern is in evidence from Arizona's experience with high standards and its market-based educational system.

---

[14] *Hooks v. Clark County Schl. Dist.*, 228 F.3d 1036 (9th Cir. 2000).

As the conservative education reformer Chester Finn has observed, the disturbing thing about Arizona's charter schools is not the number of such schools, but the fact that so few demonstrably bad schools have closed. Some charter schools are among the highest scoring schools in the state, but a greater number are among the lowest. Despite low academic performance by some charters, parents continue to send their children to these schools and their sponsors lack the political will to close them down. The fact that charter schools with abysmal test scores can continue to attract students strongly suggests that, as consumers, many parents do not select their school on the basis of its students' academic achievement.

In Arizona, the standards movement gained intensity simultaneously with the development of its market-based education system. During this period, the State Board of Education adopted very high academic standards—reaping praise from conservative education reformers—but soon had to confront the political reality that the high school graduation test that it planned to use to enforce the high standards would cause an unacceptably high failure rate—more than 60 percent of students. Looking out at a sea of angry parents, the State Board shelved high stakes testing until at least 2006. Clearly, there is a lesson here: the greatest impediment to high stakes testing is the parents of the students who are expected to benefit from such higher expectations.

Today, most policy makers believe that higher academic standards are the best means of reforming public education. What they are discovering is that parents will quickly oppose higher standards with high stakes testing when they fear that their children may not be able to get a diploma. It is unclear how public schools can adhere to high standards yet be responsive to parents as voters and consumers. Thus far, public school officials have sided with parents in expressing concerns about the validity and effect of high standards. Soon they may face difficult choices about how to keep some students from fleeing to private schools to avoid the effects of high stakes testing. The difficult linkage between these reforms is one more indication of how elusive the level playing field is and will remain in an market-based education system.

Public Schools and Vouchers: Is It True Competition?

·NSBA·

Council of School Attorneys

October 26, 2001

Public Schools and Vouchers: Is It True Competition?

NSBA

Council of School Attorneys
October 26, 2001

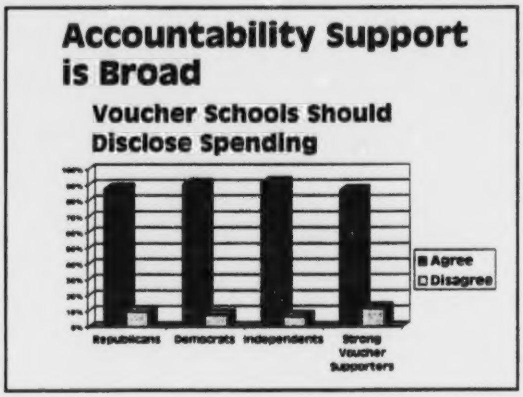
School Vouchers:
What the Public Thinks

NSBA Poll, 2001
Conducted by
Zogby International

Public Expects Accountability

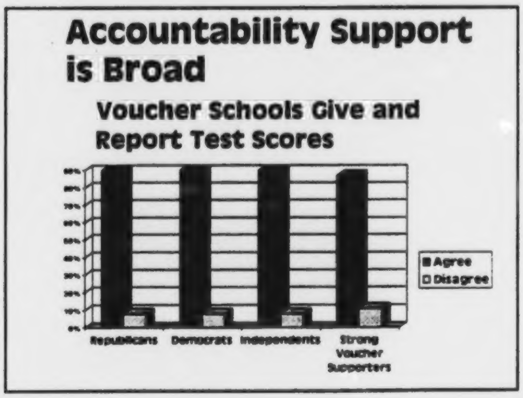
- 90% agree voucher schools should disclose spending of tax dollars
- 90% agree voucher schools should test students and report scores publicly
- 89% agree voucher schools' students should meet same academic standards as public school students
- 80% agree voucher schools should admit any student, regardless of academic and physical abilities

BEST COPY AVAILABLE



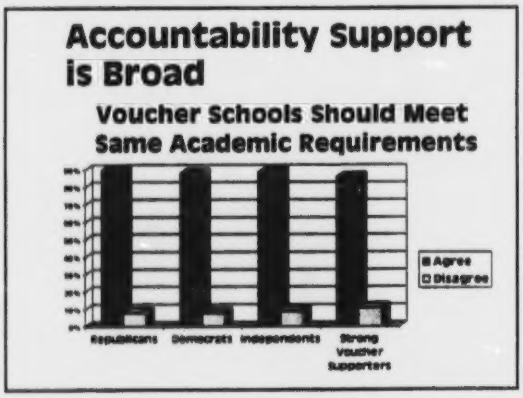
Accountability Support is Broad

Voucher Schools Should Disclose Spending



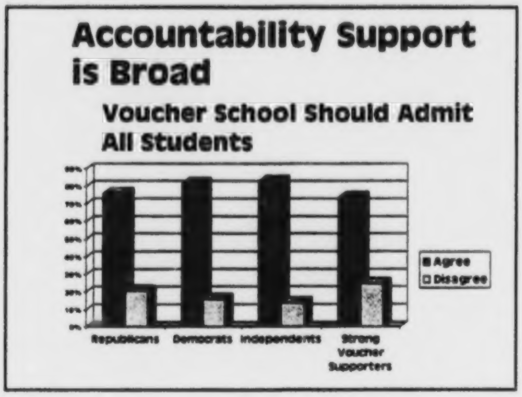
Accountability Support is Broad

Voucher Schools Give and Report Test Scores



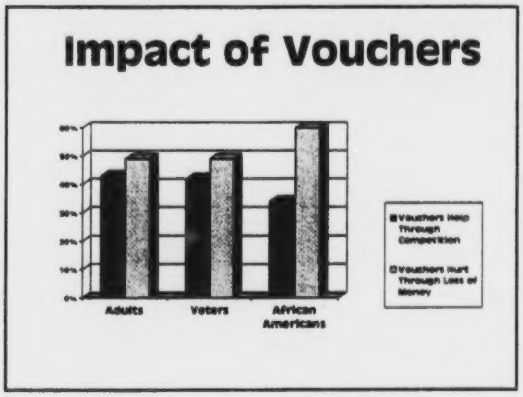
Accountability Support is Broad

Voucher Schools Should Meet Same Academic Requirements



Accountability Support is Broad

Voucher School Should Admit All Students

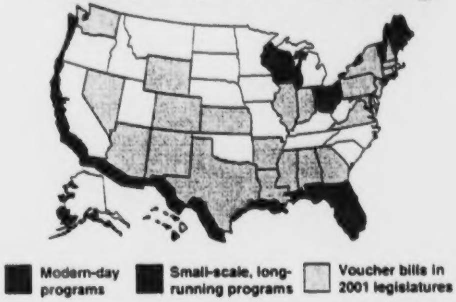


Impact of Vouchers

Unlevel Playing Field—More for Less?

- Ohio Report—more than 50 differences
- Admission, special education
- Health services, transportation
- Due-process rights, state oversight
- Open records, open meetings

Vouchers Today


■ Modern-day programs
■ Small-scale, long-running programs
☐ Voucher bills in 2001 legislatures

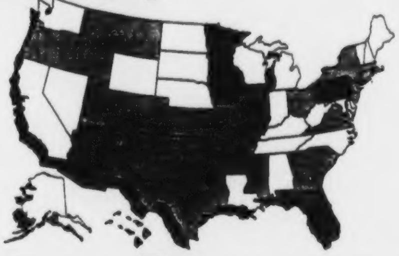
Escape Vouchers

- Politically popular approach
- 13 states with bills
- Foot-in-door approach—see Florida
- Poll: Publicly unpopular
- Programs not an escape

New Developments

- Milwaukee: 12th year
- 238 districts lost money
- No testing, no evaluations
- Florida: 3rd year
- 900 eligible students —58 used vouchers
- New program for special education students
- No accountability —scandal brewing
- Cleveland: 6th year
- Only 1 in 5 students left public schools
- 96% of students in religious schools
- Supreme Court to hear appeal

Tuition Tax Credits—Emerging



■ Existing Programs ▨ 2001 State Legislation Introduced

The Arizona Model

- Scholarship Funding Organizations (SFOs)
- 15 states with bills
- Expanding Options or benefiting existing private students?
- Accountability issues

NSBA's Voucher Strategy Center

Web site
www.nsba.org/novouchers

NSBA Voucher Strategy Center

Voucher News at Your Fingertips

Be "In the Know" When It Comes to Vouchers

Visit the National School Boards Associations'
Voucher Strategy Center Web Site
at
www.nsba.org/novouchers

- What's New?
- Court Cases
- News About Vouchers
- NSBA Voucher Toolkit
- Public School Successes
- State-by-State
- NSBA Voucher Reports
- *School Board News*
- Congressional Voucher Action

TITLE I
of the
Elementary and Secondary Education Act of 1965

in a nutshell

Prepared for

NSBA Council of School Attorneys'
2001 Advocacy Seminar
October 25-27, 2001

Kay Rigling
Attorney
Office of the General Counsel
U.S. Department of Education

TITLE I

ELEMENTARY AND SECONDARY EDUCATION ACT OF 1965

20 U.S.C. 6301 *et seq.*
34 C.F.R. Part 200

PROGRAM PURPOSE AND BACKGROUND

- Title I, Part A of the Elementary and Secondary Education Act of 1965 (Title I) provides financial assistance through state educational agencies (SEAs) to local educational agencies (LEAs) and schools with high percentages of poor children to help meet the educational needs of children who are failing, or most at risk of failing, to meet challenging academic standards.

- First authorized as part of President Lyndon Johnson's *War on Poverty*, Title I is the largest elementary and secondary education program in the Federal government with a fiscal year 2001 budget of $8.6 billion. Since its inception, Title I has distributed more than $136 billion to the 50 States, the District of Columbia, Puerto Rico, the Bureau of Indian Affairs, and the outlying areas.

- Title I serves about 12.5 million students in approximately 13,200 LEAs and nearly 48,000 schools. Approximately 92% of all LEAs receive Title I funds and approximately 27% of all public school students receive Title I services at the local level. Most students served (67%) are in grades 1 through 6; another 12% are in preschool and kindergarten programs. *See* the fact sheet *infra*.

ALLOCATION OF FUNDS

Title I funds are targeted to LEAs and schools on the basis of poverty. Most LEAs receive some Title I funds; LEAs with higher concentrations of poverty receive additional funds. More than half the public schools in the Nation participate in Title I.

Federal to local
(20 U.S.C. 6331-6337; 34 C.F.R. 200.20-200.25)

- The U.S. Department of Education allocates Title I funds to LEAs through two statutory formulas—Basic Grants and Concentration Grants—that are based primarily on census poverty data adjusted for the cost of education in each state.

    - To be eligible for a Basic Grant, an LEA must have at least 10 formula children *and* the number of formula children must exceed 2% of the LEA's school-age population.

  - To be eligible for a Concentration Grant, an LEA must have more than 6,500 formula children *or* the number of formula children must exceed 15% of the LEA's school-age population.

- An SEA may reserve 1% of the Title I funds its LEAs receive for state administration and 0.5% for school improvement activities. In addition, an SEA may adjust LEA allocations to reflect new or reconfigured LEAs. Nine SEAs have approval from the Department to use alternative poverty data to reallocate funds to LEAs with less than 20,000 total residents.

- To receive funds, an LEA must apply to the SEA by submitting either a specific Title I plan (20 U.S.C. 6312) or a consolidated plan (20 U.S.C. 8855).

Within district
(20 U.S.C. 6313; 34 C.F.R. 200.27-200.28)

- An LEA must rank its eligible school attendance areas and schools from highest to lowest poverty.

  - An eligible school attendance area is one that—
    - ✓ Is above the district-wide or grade-span poverty average; *or*
    - ✓ Has 35% or greater poverty.

- An LEA must serve *all* schools (including middle and high schools) above 75% poverty before it serves any schools below 75% poverty. Below 75% poverty, an LEA may rank and serve schools either district-wide or by grade span (e.g., elementary, middle, and high school).

- An LEA must allocate Title I funds to eligible school attendance areas and schools in rank order of poverty based on the number of poor children residing in the area or enrolled in the school.

  - A higher-poverty school must receive an amount per poor child equal to or greater than any lower-poverty school.

- Before allocating funds to schools, an LEA may reserve funds for services to children in institutions for neglected children, homeless children, parent involvement and professional development activities, administration, and other authorized activities.

TYPES OF PROGRAMS

There are two types of Title I programs: targeted assistance programs and schoolwide programs. The purpose of both types of programs is to raise the achievement of low-achieving students.

Targeted assistance programs
(20 U.S.C. 6315)

- Title I funds may be used to serve only selected students—i.e., those failing, or most at risk of failing, to meet the state's standards.

- Services must be supplemental to those the students would otherwise receive from state and local funds.

- An LEA must document that it used Title I funds only for allowable services to eligible students.

Schoolwide programs
(20 U.S.C. 6314; 34 C.F.R. 200.8)

- Because of the generally high incidence of at risk students in high poverty schools, a school with 50% or greater poverty may use Title I funds, in combination with state, local, and other federal funds, to upgrade the entire instructional program of the school.

  - ➢ Schoolwide programs are not required to identify specific students to receive services.
  - ➢ Services do not need to supplement the services participating students would otherwise receive, although Title I funds must supplement the state and local funds the school would otherwise have received.
  - ➢ Schoolwide programs do not need to document the activities on which Title I funds are spent.

SERVICES FOR PRIVATE SCHOOL STUDENTS

Title I funds do not only benefit public school students. An LEA must also provide services to eligible students who reside in Title I public school attendance areas but who attend private schools.

Equitable participation
(20 U.S.C. 6321; 34 C.F.R. 200.10-200.12)

- An LEA must provide equitable services to eligible students who attend private schools.

  - ➢ Eligible students are those who reside in a participating public school attendance area and who are failing, or most at risk of failing, to meet the state's standards.

- An LEA's responsibilities include—

  - ➢ Determining the amount of Title I funds generated by poor private school students who reside in participating public school attendance areas;

  - Consulting with private school officials, before decisions are made that affect the opportunities of private school children to participate, about how children's needs will be identified, what, where, and when services will be offered, how progress will be assessed, etc.
  - Although an LEA must consult with private school officials, the LEA makes the final decisions with respect to the services to be provided.

- An LEA must spend on services for eligible private school students, in the aggregate, an amount equal to the amount of funds generated by poor private school children.

- Services must be secular, neutral, and nonideological.

- Following the U.S. Supreme Court's decision in *Agostini v. Felton*, 521 U.S. 203 (1997), services may again be provided in private school buildings.

- Services must supplement, and in no case supplant, the level of services that would, in the absence of the Title I services, be available to participating children in private schools. Services may not benefit the needs of a private school or the general needs of students in a private school.

Public control of funds
(20 U.S.C. 6321(c); 34 C.F.R. 200.13)

- An LEA must administer and control the funds used to provide services to private school students and must keep title to materials and equipment.

- Services for private school students must be provided by employees of an LEA or through a contract with an individual or entity that is independent of a private school and of any religious organization.

Bypass
(20 U.S.C. 6321(d), 8896)

- If an LEA is prohibited by law from providing equitable services to private school students or if the Secretary determines that an LEA has substantially failed or is unwilling to provide those services, the Secretary "bypasses" the LEA and arranges to provide the services through a contractor.

STANDARDS AND ASSESSMENTS

To help *all* students reach high standards, particularly the lowest-performing students, Title I requires each state to develop or adopt challenging content standards for what it expects all students to know and be able to do, performance standards that define how well students are mastering the content standards, and an aligned assessment system for measuring whether students are mastering the standards.

Content and performance standards
(20 U.S.C. 6311(b)(1); 34 C.F.R. 200.2)

- By the 1997-98 school year, each state had to develop or adopt--
  - ➢ Challenging content standards in at least reading and mathematics that--
    - ✓ specify what children are expected to know and be able to do;
    - ✓ contain coherent and rigorous content; and
    - ✓ encourage the teaching of advanced skills.
  - ➢ Challenging student performance standards that--
    - ✓ are aligned with the state's content standards;
    - ✓ describe at least two levels of high performance, proficient and advanced, that determine how well children are mastering the material in the state's content standards; and
    - ✓ describe a third level of performance, partially proficient, to provide complete information on the progress of lower-performing children toward achieving the proficient and advanced levels of performance.

Aligned assessments
(20 U.S.C. 6311(b)(3); 34 C.F.R. 200.4)

- By the 2000-01 school year, each state had to develop or adopt a set of high-quality yearly student assessments, including assessments that measure performance in at least reading/language arts and mathematics, that will be used as the primary means of determining the performance of schools and districts. Those assessments must--
  - ➢ Be the same assessments used to measure the performance of all children, if the state measures the performance of all children;
  - ➢ Be aligned with the state's content and student performance standards, and provide coherent information about student attainment of the state's standards;
  - ➢ Be used for purposes for which the assessments are valid and reliable, and be consistent with relevant, nationally recognized professional and technical standards for those assessments;
  - ➢ Measure the proficiency of students in academic subjects in which the state has adopted content and student performance standards;
  - ➢ Be administered annually to students in at least one grade in each of three grade ranges: 3-5, 6-9, and 10-12;
  - ➢ Involve multiple approaches within an assessment system with up-to-date measures of student performance, including measures that assess complex thinking skills and understanding of challenging content;
  - ➢ Provide for--
    - ✓ Participation in the assessments of all students in the grades being assessed;

    - ✓ Reasonable adaptations and accommodations for students with diverse learning needs necessary to measure the achievement of those students relative to the state's standards;
    - ✓ Inclusion of limited-English-proficient students, who must be assessed, to the extent practicable, in the language and form most likely to yield accurate and reliable information on what they know and can do to determine their mastery of skills in subjects other than English;
  - ➢ Provide individual student interpretive and descriptive reports that include individual scores or other information on the attainment of student performance standards;
  - ➢ Enable results to be disaggregated within each state, district, and school by gender, each major racial and ethnic group, English proficiency status, migrant status, students with disabilities as compared to students without disabilities, and economically disadvantaged students as compared to students who are not economically disadvantaged.

ACCOUNTABILITY

Holding schools and LEAs accountable for the progress of their students is a cornerstone of Title I. Each state must develop a definition of "adequate yearly progress" to measure the progress of students in meeting the state's content and performance standards. If a Title I school or LEA fails to make adequate yearly progress for two consecutive years, the school or LEA must be identified for improvement and, if failure continues, corrective action.

Adequate yearly progress

(20 U.S.C. 6311(b)(2); 34 C.F.R. 200.3)

- Each state must determine what constitutes adequate yearly progress of each Title I school and district toward enabling children to meet the state's student performance standards. Adequate yearly progress must be defined in a manner that--

  - ➢ Results in continuous and substantial yearly improvement of each school and district sufficient to achieve the goal of all children, particularly economically disadvantaged and limited-English-proficient children, meeting the state's proficient and advanced levels of performance;
  - ➢ Is sufficiently rigorous to achieve that goal within an appropriate timeframe; and
  - ➢ Links progress primarily to performance on the state's assessment system, while permitting progress to be established in part through the use of other measures, such as dropout, retention, and attendance rates.

Identifying schools and LEAs for improvement and corrective action

(20 U.S.C. 6316; 34 C.F.R. 200.5-200.6)

- Using the state's definition of adequate yearly progress, each LEA must identify schools for improvement or corrective action and take appropriate interventions.

- ➢ Each LEA receiving Title I funds must review annually the progress of each Title I school to determine whether the school is making adequate progress toward enabling its students to meet state standards.
- ➢ Each LEA must identify for improvement schools that are not making adequate progress for two consecutive years.
  - ✓ A school that has been identified for improvement must develop or revise its school plan and submit it to the LEA for approval.
- ➢ Each LEA must make available technical or other assistance to identified schools as they develop and implement their plans.
- ➢ An LEA must take corrective action to improve schools that fail to make adequate progress after the third year following identification for improvement.
- ➢ A school need no longer be identified for improvement if it makes adequate yearly progress for two of three years.

- Each state must apply similar requirements with respect to its LEAs.

FISCAL REQUIREMENTS

Title I contains three fiscal requirements that ensure the supplemental nature of the program: maintenance of effort, which focuses on state and local funds at the district level; comparability of services, which focuses on state and local funds at the school level; and supplement-not-supplant, which focuses on the use of Title I funds at the child level.

Maintenance of Effort

(20 U.S.C. 6322(a), 8891; 34 C.F.R. 299.5)

- **General requirement:** An LEA may receive its full allocation of Title I funds only if the SEA determines that the LEA has maintained fiscal effort with respect to *state and local funds* used to provide free public education.

  - ➢ An LEA has maintained fiscal effort if either—
    - ✓ The combined fiscal effort per student; or
    - ✓ The aggregate expenditures of the LEA

    for the preceding fiscal year was not less than 90% of the combined fiscal effort per student or aggregate expenditures for the second preceding fiscal year.

- **Failure to maintain effort:** If an SEA determines that an LEA has failed to maintain effort, the SEA must reduce the LEA's allocation in the exact proportion by which the LEA failed to maintain effort by falling below 90% of both the combined fiscal effort per student and aggregate expenditures (using the measure most favorable to the LEA).

- **Waivers:** The Secretary may waive the maintenance of effort requirement if he determines that a waiver would be equitable due to—

  - ➢ Exceptional or uncontrollable circumstances such as a natural disaster; or

- A precipitous decline in the financial resources of the LEA.

Comparability of Services

(20 U.S.C. 6322(c), (d); 34 C.F.R. 200.63)

- **General requirement:** An LEA may receive Title I funds only if it uses *state and local funds* to provide services in Title I schools that, taken as a whole, are at least comparable to the services provided in non-Title I schools.

- **Criteria for meeting comparability:** An LEA is considered to have met the comparability requirement if the LEA files with the SEA a written assurance that it has established *and implemented* —

  - A districtwide salary schedule;
  - A policy to ensure equivalence among schools in teachers, administrators, and other staff; and
  - A policy to ensure equivalence among schools in the provision of curriculum materials and instructional supplies.

  - In the alternative, an LEA may meet the comparability requirement if it establishes and implements other measures for determining compliance such as student/teacher ratios or student/instructional staff salary ratios.

- **Documenting comparability:** An LEA must develop procedures for meeting the comparability requirement and maintain records that are updated at least biennially to document compliance.

- **Exclusions:** For purposes of determining compliance with the comparability requirement, an LEA may exclude state and local funds spent for—

  - Bilingual education for children of limited English proficiency;
  - Excess costs of providing services to children with disabilities; and
  - Supplemental programs that meet the intent and purposes of Title I.

Supplement-not-Supplant

(20 U.S.C. 6322(b), (d); 34 C.F.R. 200.63)

- **In targeted assistance schools:** An LEA may use Title I funds only to supplement, and in no case supplant, the level of funds that would, in the absence of Title I funds, be made available from non-federal sources for the education of children participating in Title I programs.

- **In schoolwide program schools:** A schoolwide program school is not required to provide supplemental services to targeted children. However, a schoolwide program school must use Title I funds only to supplement the amount of funds that would, in the absence of Title I funds, be made available from non-federal sources for that school, including funds needed to provide services that are required by law for children with disabilities and children with limited English proficiency.

- **Presumption of supplanting:** In the following instances, it is presumed that supplanting has occurred:

  - ➢ An LEA used Title I funds to provide services that the LEA was required to make available under federal, state, or local law.
  - ➢ An LEA used Title I funds to provide services that the LEA provided with non-federal funds in the prior year(s).
  - ➢ An LEA used Title I funds to provide services for participating children that the LEA provided with non-federal funds for non-participating children.

  These presumptions are rebuttable if the LEA can demonstrate that it would not have provided the services in question with non-federal funds had the federal funds not been available.

- **Exclusions:** For purposes of determining compliance with the supplement-not-supplant requirement, an LEA may exclude supplemental state or local funds expended in any school for programs that meet the intent and purposes of Title I.

Exclusions from Comparability and Supplement-not-Supplant Determinations
(20 U.S.C. 6322(d); 34 C.F.R. 200.63)

- **General requirement:** For purposes of determining compliance with the supplement-not-supplant and comparability requirements, an LEA may exclude supplemental state or local funds expended in any school for programs that meet the intent and purposes of Title I.

  A program meets the intent and purposes of Title I if the program either—

  - ➢ Is implemented in a school with 50% or more poverty;
  - ➢ Is designed to promote schoolwide reform and upgrade the entire educational operation of the school;
  - ➢ Is particularly designed to meet the educational needs of at-risk students; and
  - ➢ Uses the state's assessment system to review the effectiveness of the program.

  or—

  - ➢ Serves only children who are failing, or most at risk of failing, to meet the state's performance standards;
  - ➢ Provides supplementary services designed to meet the special educational needs of the children who are participating in the program; and
  - ➢ Uses the state's assessment system to review the effectiveness of the program.

Other applicable statutes include Title XIV (General Provisions) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 8801 *et seq.*) and the General Education Provisions Act (GEPA) (20 U.S.C. 1221 *et seq.*). Other applicable regulations include 34 C.F.R. Part 299

(General Provisions) and the Education Department General Administrative Regulations (EDGAR), 34 C.F.R. Parts 76, 77, 80, 81, 82, 85, 98, and 99.

In addition, the Department has issued a number of policy documents containing nonregulatory guidance applicable to Title I. For a site with links to relevant statutes, regulations, and policy guidance, *see*

www.ed.gov/offices/OESE/leg_reg.html

Fact Sheet on Title I, Part A

July 2001

What is the budget for Title I, part A?	➢ FY 2001 appropriation for Part A - **$8.6 billion** ➢ FY 2002 budget request for Part A - **$9.1 billion**
How many children receive assistance?	➢ 12.5 million
What grade levels are Title I students? What percentage of Title I participants are private school students?	➢ 12% are in kindergarten and preschool ➢ 67% are in the firs- through sixth grade ➢ 15% are seventh-, eighth-, or ninth-graders ➢ 5% are in high school ➢ 1% are in private schools
What are the demographics of Title I students?	➢ 35% White, non-Hispanic ➢ 29% African-American ➢ 29% Hispanic ➢ 3% Asian or Pacific Islander ➢ 2% American Indian or Alaskan Native ➢ 1% other from other ethnic/racial groups ➢ 2 million have limited English proficiency ➢ 100,000 are homeless ➢ 1.2 million have disabilities
How many Title I schools are there?	➢ 47,700 (58% of all public schools)
What percentage of elementary and secondary schools receive Title I funds?	➢ 67% of all elementary schools ➢ 29% of all secondary schools
What percentage of Title I funds goes to high-poverty schools?	➢ 46% to the highest-poverty schools (over 75% of the students are eligible for free or reduced –price lunches) ➢ 27% to other high-poverty schools (50-74% eligible for free or reduced-price lunches) ➢ The remaining 27% goes to schools with fewer than 50% of their students eligible for free or reduced-price lunches
How many of the highest-poverty schools receive Title I assistance?	➢ 96%
What percentage of Title I funds goes to schoolwide versus targeted assistance programs?	➢ 60% supports schoolwide programs ➢ 40% is allocated to targeted assistance
How much Title funding per students do schools receive?	➢ Title I allocations to schools averaged $472 per low-income student in the 1997-98 school year.
How were Title I dollars spent during the 1997-98 school year?	➢ 77% ($5.5 billion) for instruction ➢ 12% ($82 million) for instructional support ➢ 12% (82 million) for administration
How many states have received approval for their standards and assessment systems?	➢ 51 for content standards (including D.C. and Puerto Rico ➢ 28 for performance standards ➢ 14 for assessment systems
What are the trends in student achievement for high-poverty schools?	➢ Long-terms tends in NAEP scores depict a widening achievement gap between high-and low-poverty schools from the late 1980s to 1999, with schools declining in high-poverty schools while increasing in low-poverty schools. ➢ However, Trend NAEP scores for highest-poverty schools have risen since 1992 in both reading and mathematics. ➢ Among low-performing students, NAEP scores during the 1990s showed no significant change in reading but substantial gains in math. ➢ State assessment results are available for a small number of states, and show a more positive picture than the NAEP data. In both reading and math, high-poverty schools show achievement gains over a recent 3-year period. The achievement gap between high-and low-poverty schools decreased in 6 of the 9 states.

Title I

What Every School Attorney Should Know

Advising Clients About Properly Accessing Federal Funding for Disadvantaged Students

Presented to

NSBA Council of School Attorneys'
2001 Advocacy Seminar
October 26, 2001

Title I Citations

20 U.S.C. 6301-6338; 6511-6514

34 C.F.R. Part 200

Title I Demographics

- FY 2001 appropriation -- $8.6 billion
- 93% of school districts receive Title I funds
- 47,700 schools (58%) receive Title I funds (67% of elementary schools; 29% of secondary schools)
- 12.5 million students served in FY 2001 (67% are in grades 1-6)

Targeting Funds

Federal to local

- Title I funds are allocated on the basis of poverty

Basic Grants
10 or more poor children
and
> 2% of school-age population is poor

Concentration Grants
>15% of school-age population is poor
or
>6500 poor children

- ED determines school district allocations

Targeting Funds

Within districts

- Funds are allocated to eligible schools
- Schools are ranked in order of poverty
- Schools are served in rank order
- Funds are allocated based on numbers of poor students

Types of Programs

Targeted assistance programs

Supplemental services are targeted on specific students—those most at risk of failing to meet state standards

Schoolwide programs

Funds may be used to upgrade the entire instructional program in the school

Services for Private School Students

Equitable participation

Consultation with private school officials before decisions are made that affect opportunities to participate

Following *Agostini v. Felton, 521 U.S. 203 (1997)*, services may be provided in private school buildings

Supplemental/secular, neutral and nonideological

Funds must be in public control

Standards, Assessments, Accountability

Content Standards

Performance Standards

Aligned Assessments

Holding schools and districts accountable for results

Fiscal Requirements

Maintenance of effort = districts
Comparability of services = schools
Supplement-not-supplant = students

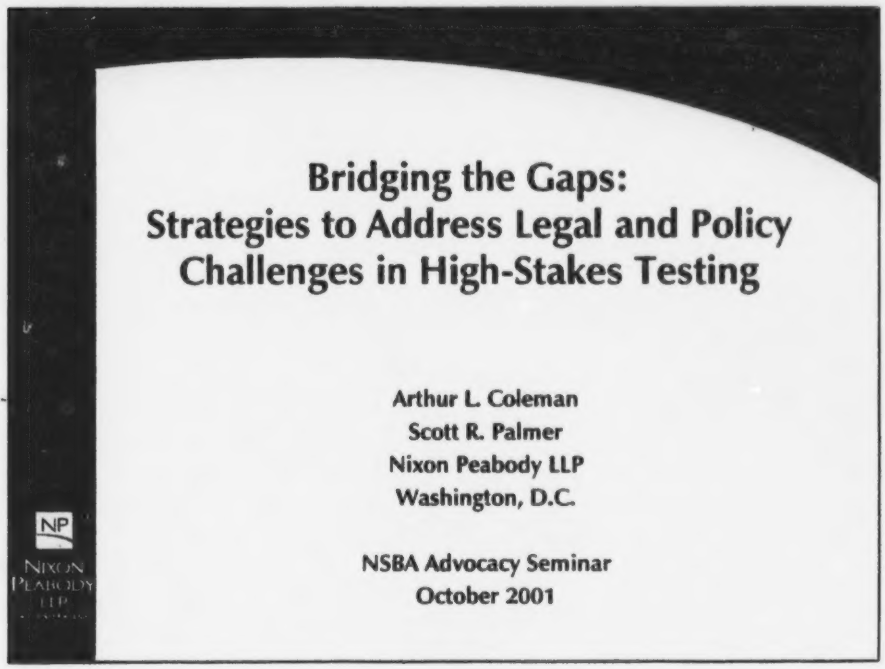
designed to ensure the supplemental nature of Title I funds

Kay Rigling
Office of the General Counsel
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202
(202) 401-8292
Kay.Rigling@ed.gov

Bridging the Gaps: Strategies to Address Legal and Policy Challenges in High-Stakes Testing

Arthur L. Coleman
Scott R. Palmer
Nixon Peabody LLP
Washington, D.C.

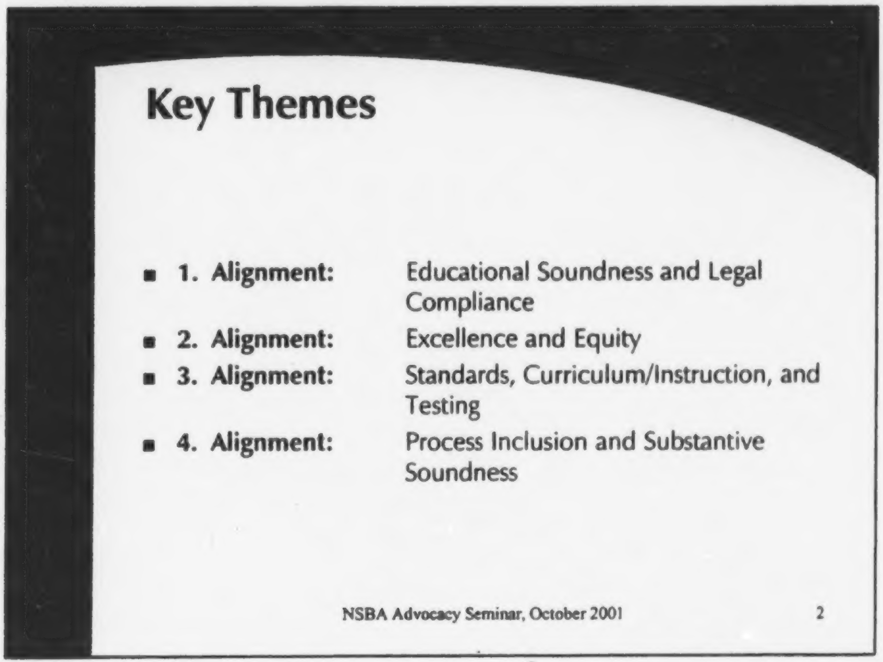
NSBA Advocacy Seminar
October 2001



Bridging the Gaps: Strategies to Address Legal and Policy Challenges in High-Stakes Testing

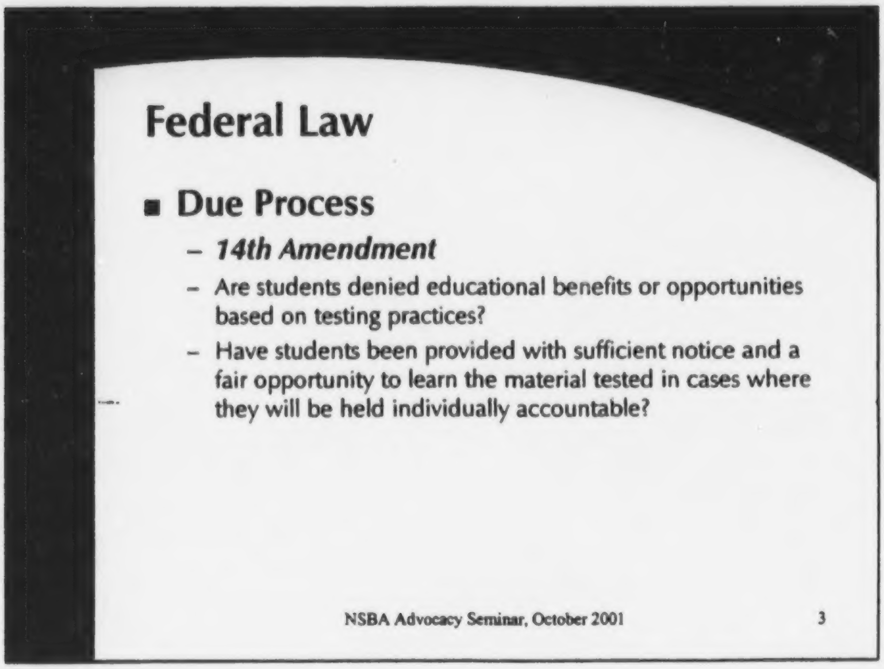
Arthur L. Coleman
Scott R. Palmer
Nixon Peabody LLP
Washington, D.C.

NSBA Advocacy Seminar
October 2001



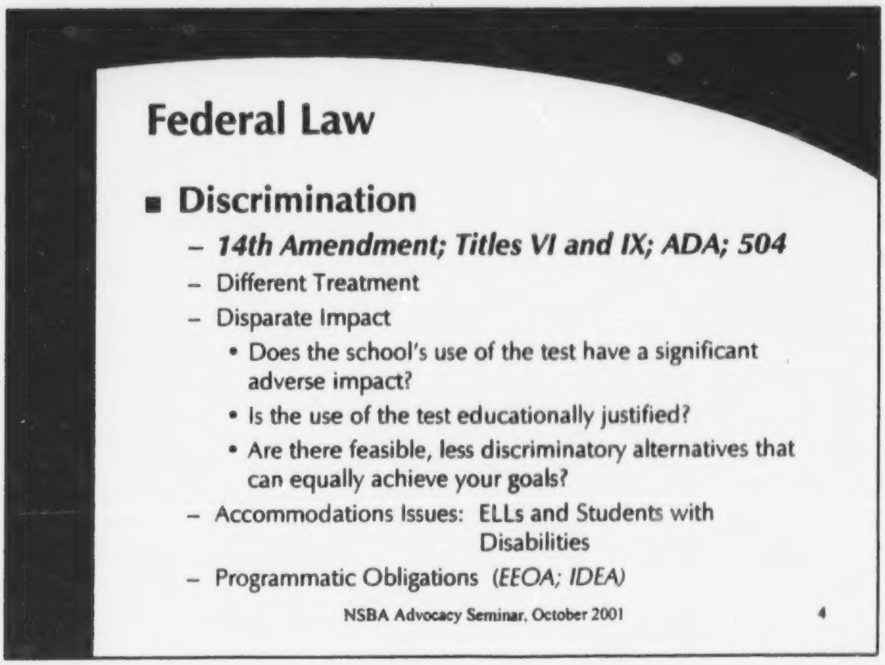
Key Themes

1. **Alignment:**	Educational Soundness and Legal Compliance
2. **Alignment:**	Excellence and Equity
3. **Alignment:**	Standards, Curriculum/Instruction, and Testing
4. **Alignment:**	Process Inclusion and Substantive Soundness



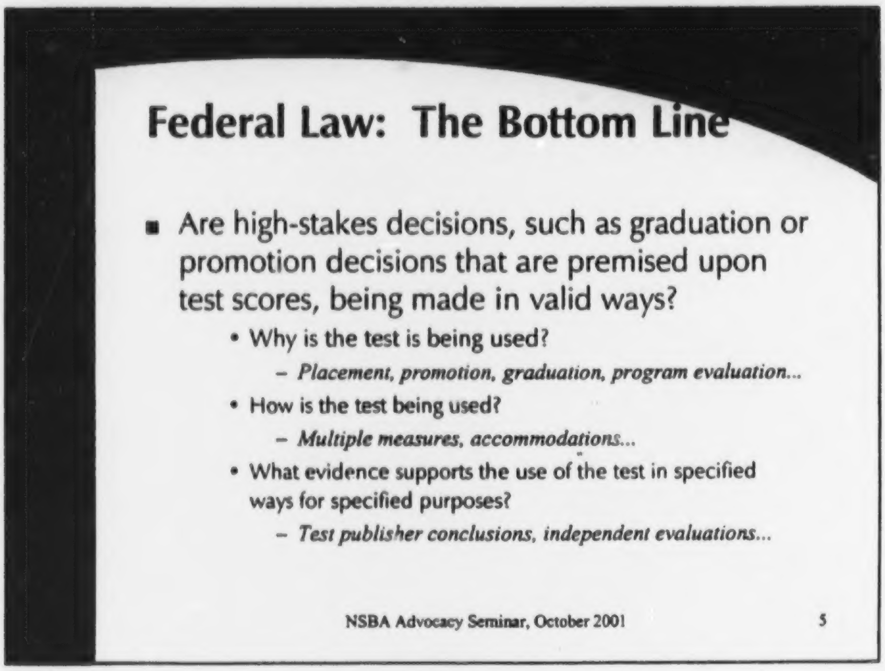
Federal Law

- **Due Process**
  - *14th Amendment*
  - Are students denied educational benefits or opportunities based on testing practices?
  - Have students been provided with sufficient notice and a fair opportunity to learn the material tested in cases where they will be held individually accountable?



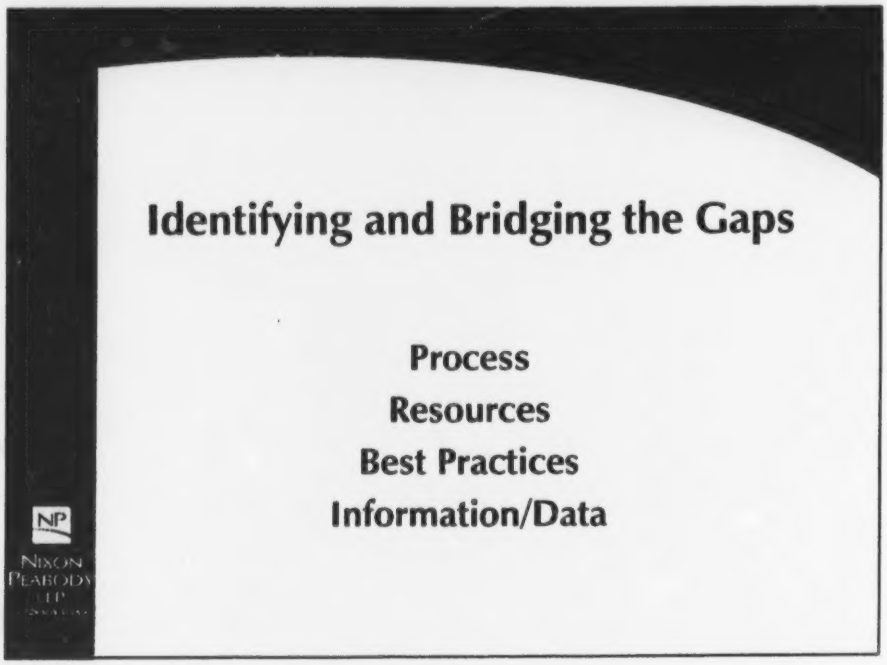
Federal Law

- **Discrimination**
  - ***14th Amendment; Titles VI and IX; ADA; 504***
  - Different Treatment
  - Disparate Impact
    - Does the school's use of the test have a significant adverse impact?
    - Is the use of the test educationally justified?
    - Are there feasible, less discriminatory alternatives that can equally achieve your goals?
  - Accommodations Issues: ELLs and Students with Disabilities
  - Programmatic Obligations *(EEOA; IDEA)*



Federal Law: The Bottom Line

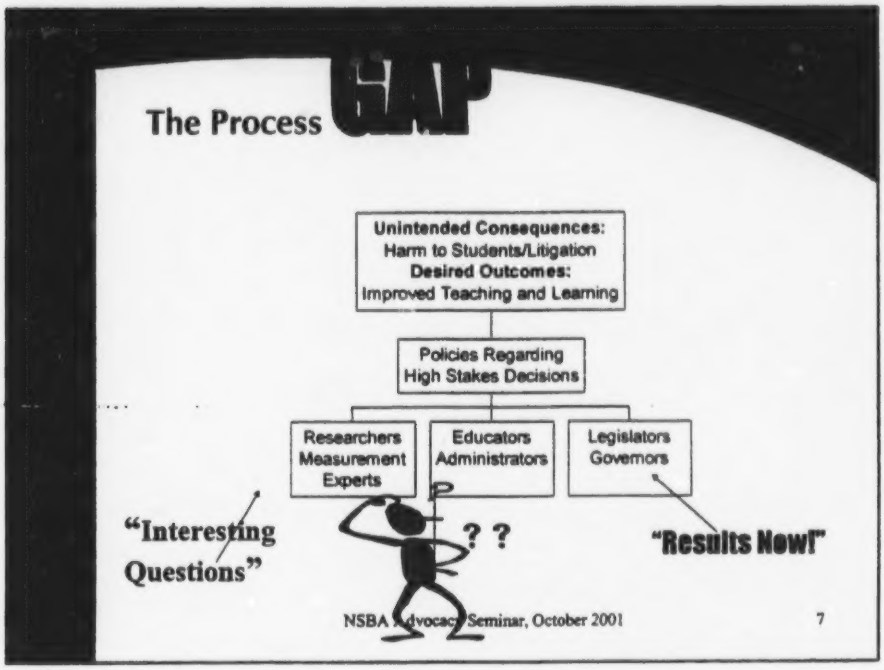
- Are high-stakes decisions, such as graduation or promotion decisions that are premised upon test scores, being made in valid ways?
  - Why is the test is being used?
    - *Placement, promotion, graduation, program evaluation...*
  - How is the test being used?
    - *Multiple measures, accommodations...*
  - What evidence supports the use of the test in specified ways for specified purposes?
    - *Test publisher conclusions, independent evaluations...*



Identifying and Bridging the Gaps

Process
Resources
Best Practices
Information/Data

NP
NIXON PEABODY LLP



The Process GAP

Unintended Consequences:
Harm to Students/Litigation
Desired Outcomes:
Improved Teaching and Learning

Policies Regarding
High Stakes Decisions

Researchers
Measurement
Experts

Educators
Administrators

Legislators
Governors

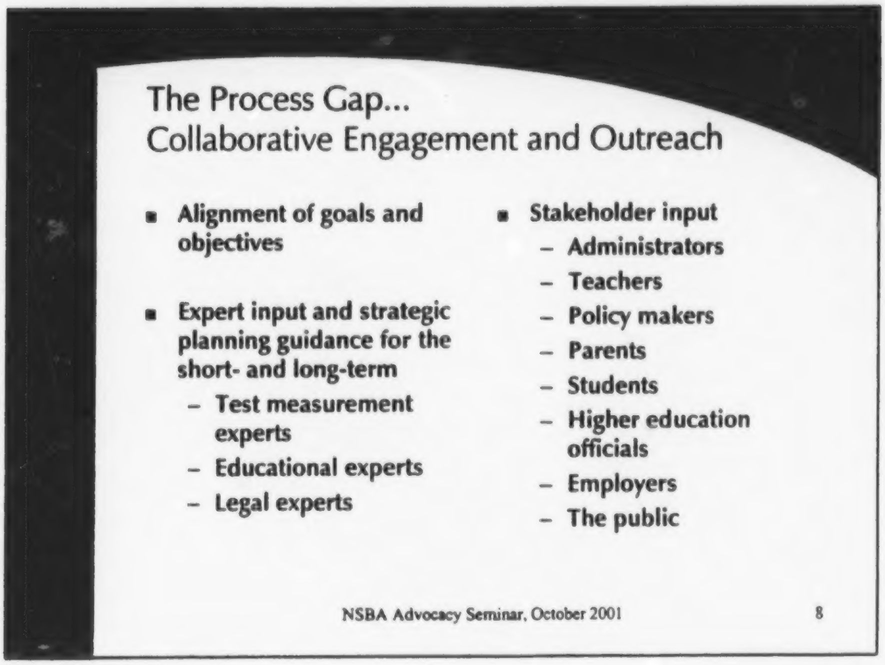
"Interesting Questions"

? ?

"Results Now!"

NSBA Advocacy Seminar, October 2001

7



The Process Gap...
Collaborative Engagement and Outreach

- Alignment of goals and objectives
- Expert input and strategic planning guidance for the short- and long-term
  - Test measurement experts
  - Educational experts
  - Legal experts
- Stakeholder input
  - Administrators
  - Teachers
  - Policy makers
  - Parents
  - Students
  - Higher education officials
  - Employers
  - The public

NSBA Advocacy Seminar, October 2001

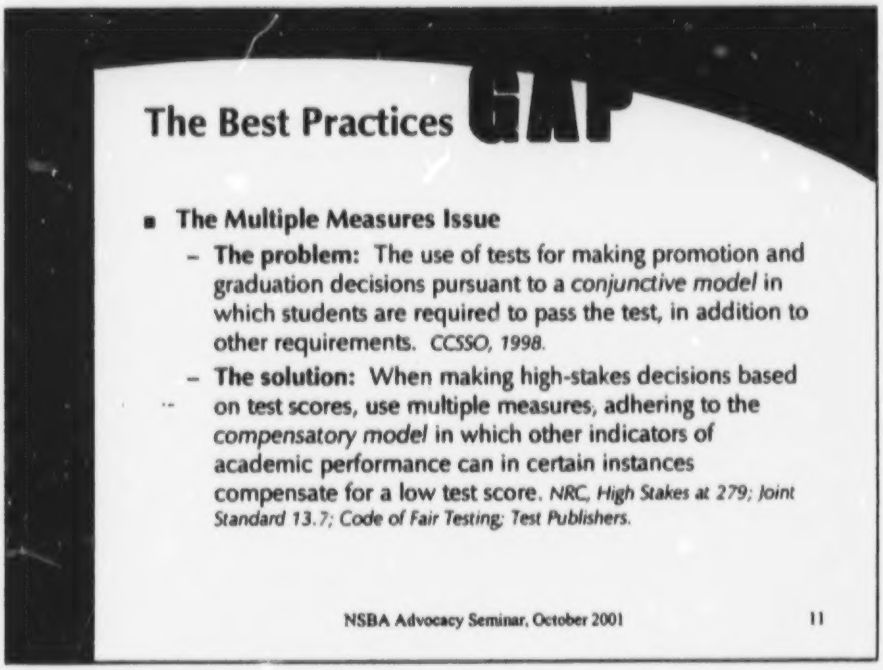
8

The Educational Resources

- **The opportunity to learn issue**
  - **The problem:** The imposition of high-stakes testing without necessary educational foundations.
  - **The solution:** The attachment of high-stakes decisions to test scores **after** educational foundations are in place:
    - Aligned curriculum and instruction. *Debra P. and GI Forum.*
    - Resources and facilities ensuring equal opportunity. *Debra P.; GI Forum; and Title VI*
    - Programmatic commitment to success for all, regardless of status or achievement to date. *IDEA and 504; EEOA and Title VI.*
    - Timely and effective interventions. *GI Forum and Title VI.*

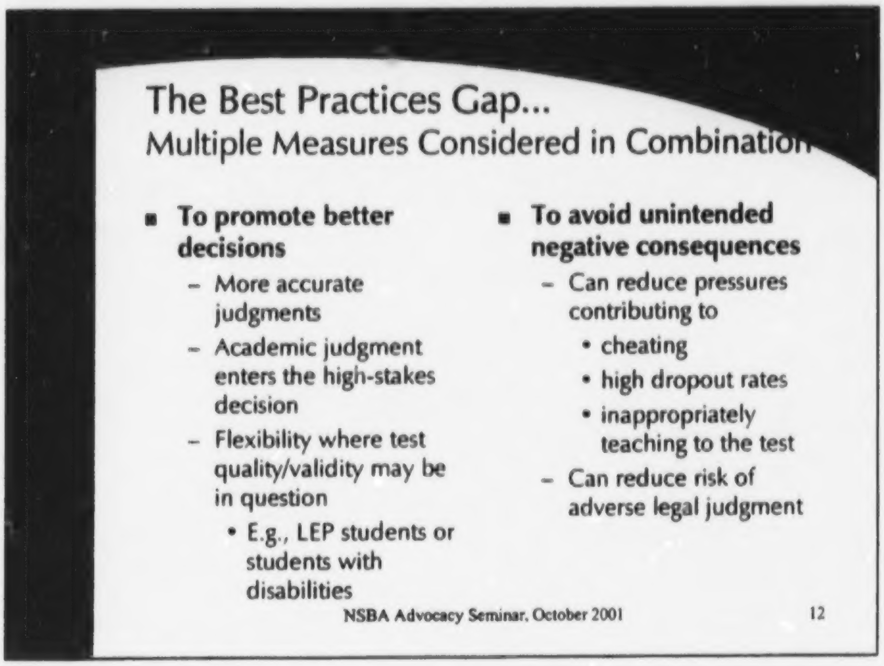
The Resources Gap...
Inputs Count (and Can Be Counted)

- **Funding**
  - **State/local revenue per pupil**
- **The Classroom**
  - **Instructional expenditures as percent of total expenditures**
  - **Class size**
  - **Teacher-student ratio**
    - **Teaching in field**
    - **Years of experience**
  - **Professional development support**
  - **Curricula offerings**
  - **Textbooks and supplies**
  - **Technology availability and integration in instruction**
- **Program resources for all students**
  - **ELL instructional services, including comparable curriculum and qualified teachers**
  - **Support for students with disabilities**
  - **After-school and summer programs**
- **Facilities**
  - **Physical facilities**
- **Measures of success**
  - **Performance on statewide assessments**
  - **Trends in performance on statewide assessments**



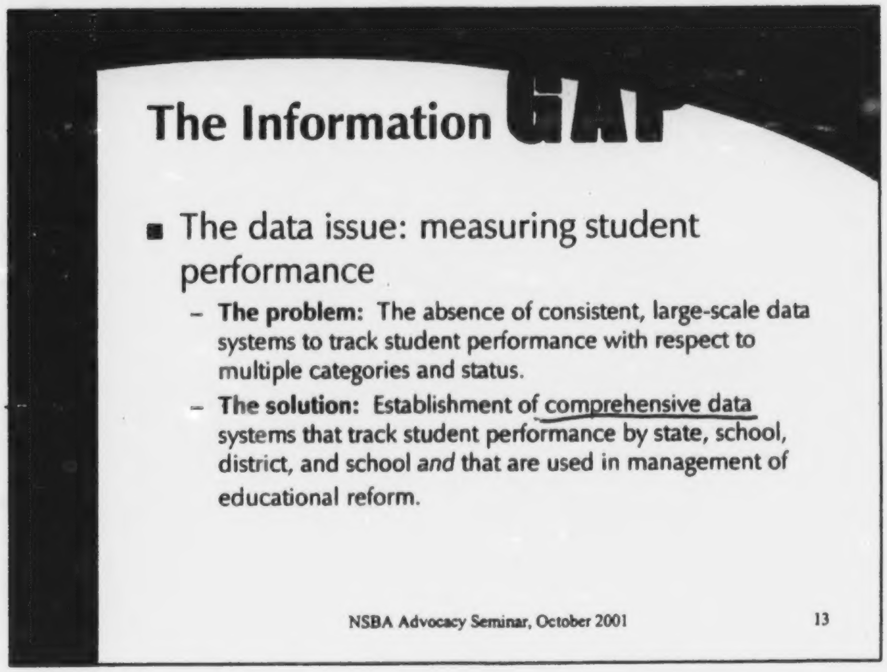
The Best Practices GAP

- **The Multiple Measures Issue**
  - **The problem:** The use of tests for making promotion and graduation decisions pursuant to a *conjunctive model* in which students are required to pass the test, in addition to other requirements. *CCSSO, 1998.*
  - **The solution:** When making high-stakes decisions based on test scores, use multiple measures, adhering to the *compensatory model* in which other indicators of academic performance can in certain instances compensate for a low test score. *NRC, High Stakes at 279; Joint Standard 13.7; Code of Fair Testing; Test Publishers.*



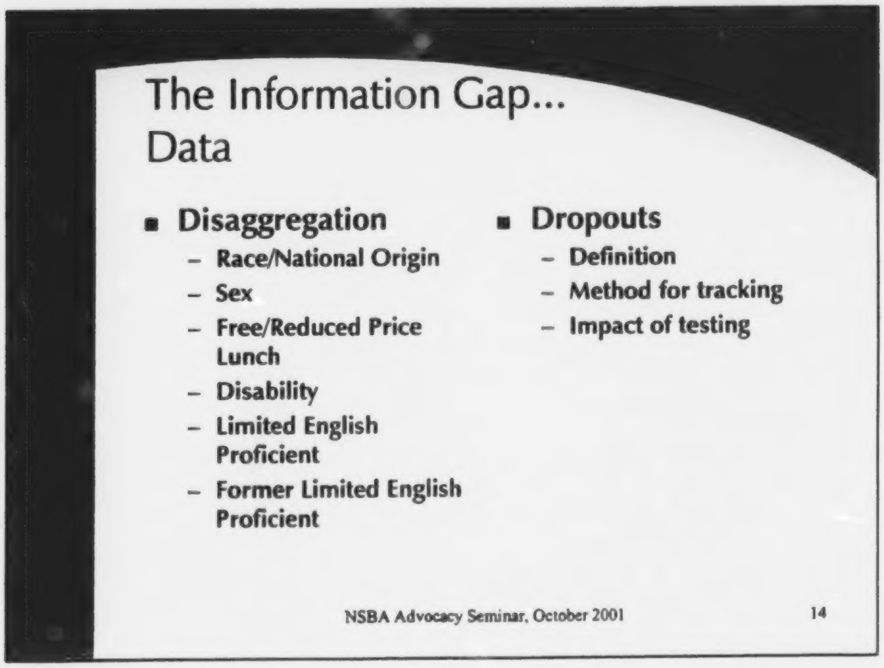
The Best Practices Gap...
Multiple Measures Considered in Combination

- **To promote better decisions**
  - More accurate judgments
  - Academic judgment enters the high-stakes decision
  - Flexibility where test quality/validity may be in question
    - E.g., LEP students or students with disabilities
- **To avoid unintended negative consequences**
  - Can reduce pressures contributing to
    - cheating
    - high dropout rates
    - inappropriately teaching to the test
  - Can reduce risk of adverse legal judgment



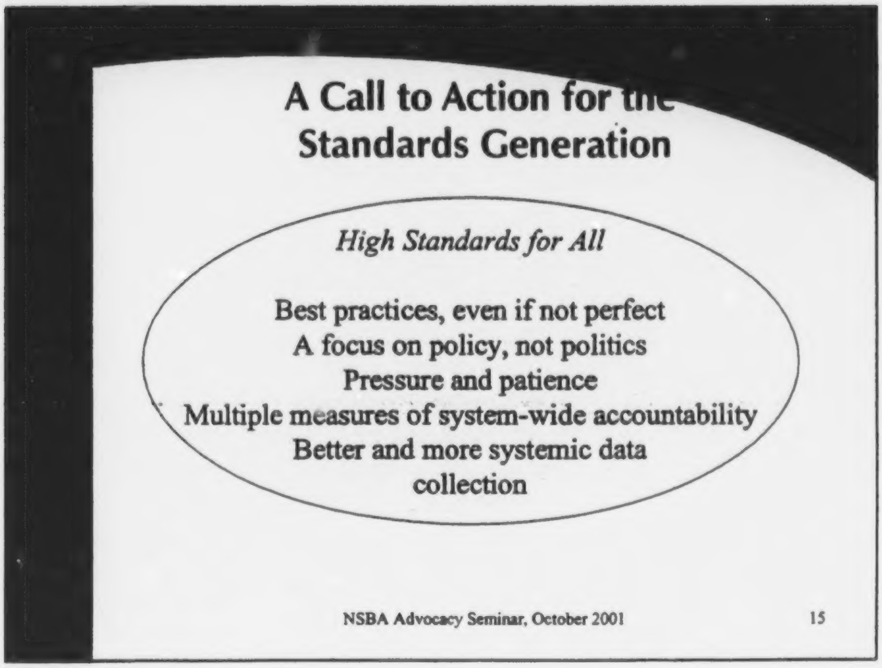
The Information GAP

- The data issue: measuring student performance
  - **The problem:** The absence of consistent, large-scale data systems to track student performance with respect to multiple categories and status.
  - **The solution:** Establishment of comprehensive data systems that track student performance by state, school, district, and school *and* that are used in management of educational reform.



The Information Gap...
Data

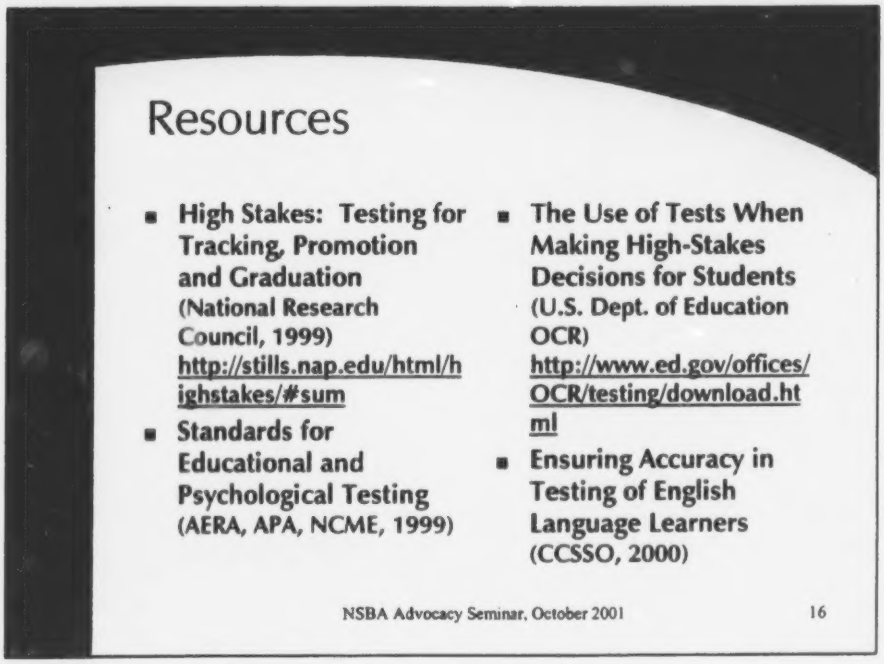
- **Disaggregation**
  - **Race/National Origin**
  - **Sex**
  - **Free/Reduced Price Lunch**
  - **Disability**
  - **Limited English Proficient**
  - **Former Limited English Proficient**
- **Dropouts**
  - **Definition**
  - **Method for tracking**
  - **Impact of testing**



A Call to Action for the Standards Generation

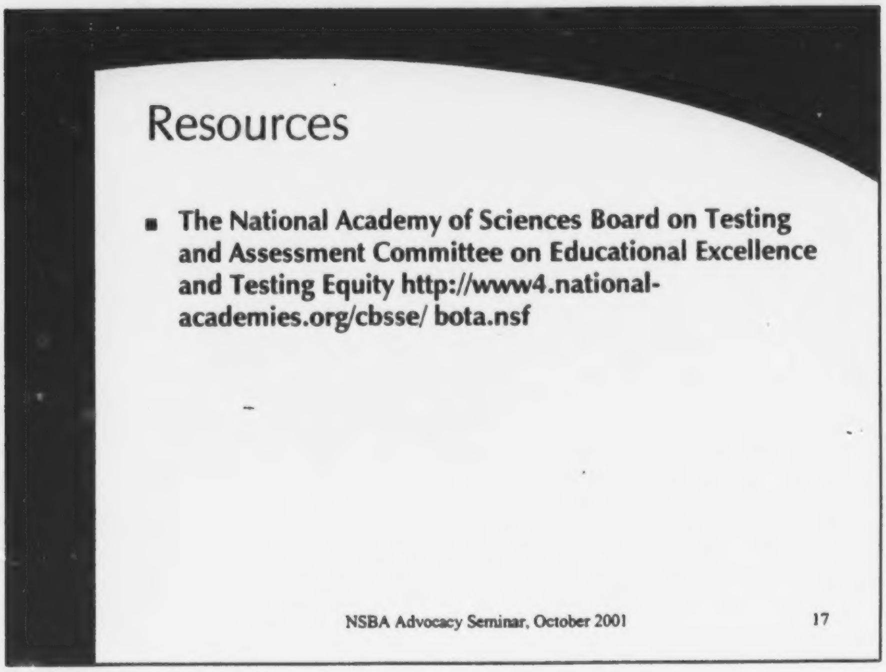
High Standards for All

Best practices, even if not perfect
A focus on policy, not politics
Pressure and patience
Multiple measures of system-wide accountability
Better and more systemic data collection



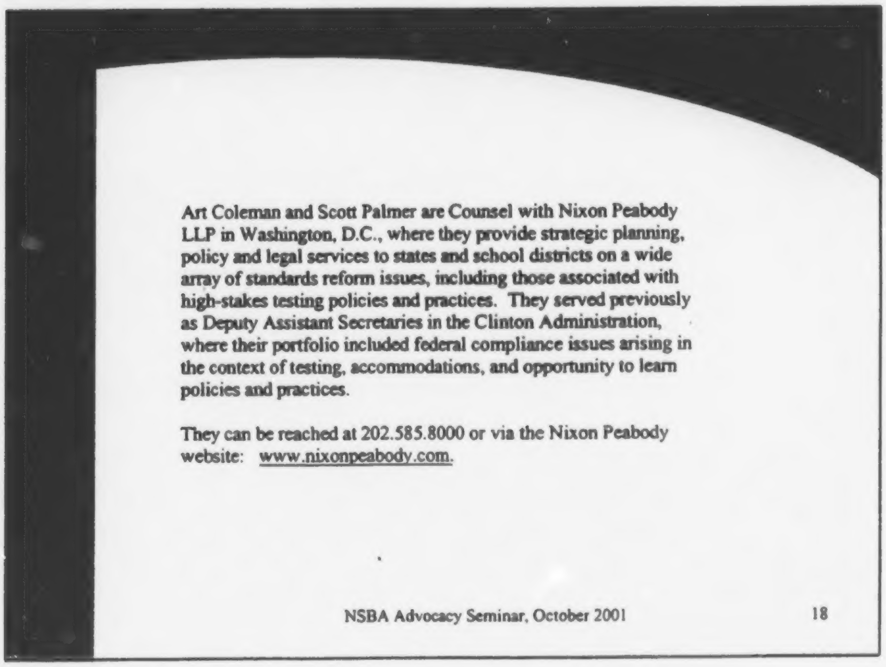
Resources

- **High Stakes: Testing for Tracking, Promotion and Graduation** (National Research Council, 1999) http://stills.nap.edu/html/highstakes/#sum
- **Standards for Educational and Psychological Testing** (AERA, APA, NCME, 1999)
- **The Use of Tests When Making High-Stakes Decisions for Students** (U.S. Dept. of Education OCR) http://www.ed.gov/offices/OCR/testing/download.html
- **Ensuring Accuracy in Testing of English Language Learners** (CCSSO, 2000)



Resources

- **The National Academy of Sciences Board on Testing and Assessment Committee on Educational Excellence and Testing Equity http://www4.national-academies.org/cbsse/ bota.nsf**



Art Coleman and Scott Palmer are Counsel with Nixon Peabody LLP in Washington, D.C., where they provide strategic planning, policy and legal services to states and school districts on a wide array of standards reform issues, including those associated with high-stakes testing policies and practices. They served previously as Deputy Assistant Secretaries in the Clinton Administration, where their portfolio included federal compliance issues arising in the context of testing, accommodations, and opportunity to learn policies and practices.

They can be reached at 202.585.8000 or via the Nixon Peabody website: www.nixonpeabody.com.

Student Testing and Assessment: Answering the Legal Questions

Dana T. Buckman
Arthur L. Coleman
David A. Farmelo
Naomi E. Gittins
Kathleen S. Mehfoud
Lori S. Thomas
R. Craig Wood

September 2000

·NSBA·

A Framework for Addressing Student Test Use Issues*

Arthur L. Coleman
Nixon Peabody, LLP
Washington, D.C.

INTRODUCTION

In the last decade, accountability became the driving force behind public education reforms. Echoes of "are my child's teachers qualified?," "does my child's school measure up to others?" and "does my child know enough?" continue to reverberate in conversations about the performance of our schools nationwide. Few educators dispute the importance of accountability in education, but many vigorously disagree about how to ensure accountability for students, teachers, and schools—especially when the subject of test use arises.

Education reforms that rely on high-stakes tests to measure student achievement have increased the focus on the legal parameters and educational principles that should guide decisions about student promotion and high school graduation. This article will describe the central legal and educational principles that should guide the development and implementation of tests used in these ~~critical, high-stakes decisions.~~ ~~Ultimately~~, the lessons to be derived from federal jurisprudence, educational research and practice, and psychometric principles are as simple as they are important. They are:

- The determination of whether a test is valid cannot be made without knowing the educational objective and purpose of the test. A test may be valid for one situation or use and invalid for others; likewise it may be valid when measuring the performance of some test-takers and not others.
- Any test with high-stakes consequences for students must be valid for its particular use. This means tests designed to measure learning and used to determine high school graduation or advancement from grade to grade must fairly measure what the student has been taught. As a general proposition, there must be alignment among the curriculum, instruction and material covered on such a high-stakes assessment. Issues related to accommodations or alternative testing for students who are not fully proficient in English and students with disabilities must also be examined with care to ensure that the testing of these students corresponds to their particular educational programs.
- Test results can provide very valuable guidance in deciding whether to promote a student. However, a test is only

---

* An earlier version of this article appeared in *Inquiry & Analysis* (NSBA Council of School Attorneys, Mar. 1999). Segments of this article are taken from: Coleman, ***Excellence and Equity in Education: High Standards for High-Stakes Tests***, 6 VA. J. SOCIAL POL. & L. 81 (Fall 1998), which provides more extensive and detailed coverage of the issue. Citations to the legal, educational and psychometric principles set forth herein can be found in that article. Segments used with permission. Readers interested in this issue also should review: National Research Council, HIGH STAKES: TESTING FOR TRACKING, PROMOTION, AND GRADUATION. (J. Heubert & R. Hauser, eds., 1999). *See* Appendix D for other related resources.

one tool among many. Many factors—some relating to what a test measures, and some not—may affect a student's performance on a particular test. Not surprisingly, therefore, psychometric standards confirm that a single test score should not be used as the sole criterion to make high-stakes educational decisions, such as high school graduation or promotion from grade to grade.

- The existence of statistically significant disparities in test scores among discrete student populations (*e.g.*, minority-nonminority; urban-rural) should cause further inquiry and examination regarding the relevant educational program and associated testing practices. Group differences in test scores may reflect a range of causal factors unrelated to the test, such as lack of preparation for the test, or they may reflect a problem with the test itself. Strategic and systematic monitoring of results over time can help prevent (and cure) problems of test bias, other discriminatory practices, or programmatic deficiencies affecting student learning.

EDUCATIONAL RIGHTS AND RESPONSIBILITIES: SOME FOUNDATIONS

Several fundamental principles underlie the framework of questions policy makers and educators should consider to ensure testing practices appropriately influence educational decisions about student advancement. These guiding principles have: (1) influenced an array of federal court decisions since the 1954 decision in *Brown v. Board of Education*;[1] (2) shaped federal educational policy since at least 1993; and (3) informed the policy choices in numerous states and locales that have grappled with standards-based reform issues.

Principle One: The basic obligation of public educators is to teach students, with their different backgrounds and abilities, the knowledge and skills they need to progress academically and mature with meaningful expectations of a productive life.

Simply put, the job of the public educator is to prepare students to be successful members of society. This educational mandate is no less present during classroom instruction than it is when educators administer, evaluate and act on student test results. Tests, in short, should be instruments used by educators to accomplish this goal. Thus, policy makers and the education community must work to guarantee that the establishment of high standards for all students does not unfairly deny educational opportunity to any one student.

Principle Two: The goals of guaranteeing excellence by promoting high academic standards and ensuring that all students have fair opportunities to achieve success in public education are inseparable, mutually dependent goals.

The goals of excellence through high academic standards and the opportunity for students to achieve success in public education are corresponding, coextensive goals—not, as some maintain, irreconcilable objectives. Policy makers and the education community should approach the issues regarding the use of high-stakes tests with a commitment to ensure that all students can learn in an environment in which standards are high and in which "all" means "all." They must appropriately address the right questions when designing and implementing test-related reforms so that all students receive the opportunity to learn to standards that reflect the curriculum and instruction, and that are measured fairly.

Principle Three: If it doesn't make educational sense, it can't make legal sense under federal civil rights laws.

The legal standards that guide the enforcement and adjudication of federal civil rights laws related to student access to education are ultimately premised on educational judgments—not some abstract legal theory. For instance, in claims of race, national origin or sex discrimination in education, the dispositive questions posed by the courts center upon the adversity to a student's (or group of students') educational opportunity. The courts focus on the foundations for the educational decision-making leading to the challenged practice.

---

[1] 347 U.S. 483 (1954).

FEDERAL LEGAL STANDARDS AND INQUIRIES

The parameters that should guide educators in the design and use of high-stakes tests can be found in an array of federal cases raising race discrimination and due process challenges in the elementary and secondary context. The legal inquiry under a typical (non-intentional) race discrimination challenge is:

- Does the use of the test cause an adverse racial impact: does the use of the test cause a denial of educational opportunities to students of one race in numbers significantly disproportionate to the numbers eligible for the educational opportunity being denied—when compared to students of other races? and
- Is the use of the test educationally necessary: is the test valid for the particular purpose used and, if so, are there feasible, less discriminatory alternatives that would as effectively serve the educational objectives identified by the school?

The federal due process inquiry typically centers on the sufficiency of the notice of the testing requirement and the opportunity that students have had to learn the material tested. The legal inquiry is:

- Are students denied educational benefits or opportunities to which they have a legitimate claim, based on their test scores? In legal terms, is there a denial of a property right or liberty interest? and
- Have the students been provided with a fair opportunity to pass the test? More particularly, is the test valid for the purpose used?

Whether it is a claim of discrimination or a broader claim of unfairness in the test design or in test-related practices, the ultimate question upon which the typical federal legal analysis hinges is one of educational sufficiency: is the test valid for the purposes used for all students taking the test? The questions in each instance are, in simple terms: Does the test do what it is intended to do? Are the inferences derived from test scores and the educational judgments based on those inferences appropriate?

The federal courts have also affirmed some psychometric principles that demonstrate the highly complex, contextual and fact-intensive nature of the inquiry regarding the validity of the use of test results. Accordingly, no one-size-fits-all formula can guide decision making regarding test use—particularly with regard to high-stakes decision making, about how to link test results to student promotion from grade to grade. However, principles derived from the federal cases dealing with the issue of standards, equity and high-stakes test use can be distilled into questions that should be thoroughly examined and addressed when schools consider high-stakes testing.

FRAMEWORK TO GUIDE THE USE OF HIGH-STAKES TESTS

What are the educational objectives or justifications that support the use of a particular test?

Before any state or district administers any test, the objectives of the testing exercise should be clear: what are the goals for and uses of the test? The answer to this question will guide all other relevant inquiries about whether the test is educationally appropriate. Judgments about a test's validity are impossible, and the conclusions one may draw from the results are meaningless, absent clear test use objectives. For example, one cannot conclude that a particular test of ninth grade science proficiency is, as a general proposition, a valid test. A test of student achievement and learning fully aligned with District A's ninth grade science curriculum and instruction and validated according to professional standards for such use may be an appropriate consideration when making promotion decisions about students taking the test. Conversely, that same test, if used as a tool to make special education decisions or used to determine college admissions, would neither pass legal nor psychometric scrutiny. In fact, the test would not necessarily be appropriate to use with District B to measure ninth grade science proficiency absent a determination that material tested was fairly representative of the material taught in District B's ninth grade science courses.

Not surprisingly, compliance with federal legal standards related to due process and discrimination protections rests, in the first instance, upon the educational judgment about the purpose and use of the test. Central to this inquiry is the issue of whether high-stakes consequences attach to the test results at all. Is the test designed to monitor a student's or school's performance and to inform educators over time about the need for additional resources? Or, is the test designed as a gatekeeper, so that failure has particular and real consequences for the student taking the test? Absent a denial of educational opportunity to particular students, federal constitutional or statutory protections designed to ensure fair and equitable opportunities for students are less likely to be triggered. Even if a test is not high-stakes, civil rights protections may apply where the opportunity to take the test is itself an educational benefit, and that opportunity is denied on the basis of race, national origin, gender or disability. If the test use in question has high-stakes consequences, then the ultimate legal inquiry parallels the ultimate educational question: Do the test results at issue allow for informed and consequential decisions to be made about students taking the test? In other words, are the conclusions derived from the test results valid?

Is there alignment between the material tested and the curriculum and instruction? Have the students who must achieve to a school's academic standards been provided the necessary instruction to give them a fair opportunity to do so?

As instruments designed to inform students, parents and educators about success in meeting educational goals, high-stakes tests should be developed and administered as part of the educational effort to improve student performance; they should be integrated into the overall educational program. When tests (as measures of outcomes) are aligned with the curriculum and instruction (the educational inputs), they will more likely be measures of classroom learning. When the content of a high-stakes test reflects actual classroom instruction and the curriculum of an educational system, appropriate test use can help achieve educational excellence for all students. In addition, when tests provide a fair basis for making decisions regarding student graduation or promotion from an educational standpoint, the more likely they will pass legal scrutiny.

In the leading case on the subject, *Debra P. v. Turlington*,[2] the Fifth Circuit Court of Appeals ruled that a state proposing testing requirements as a condition of high school graduation was obligated to determine if the material being tested was actually being taught. The court found the test "was fundamentally unfair in that it may have covered matters that were not taught in the schools of the state."[3] Recently, the federal district court in *G.I. Forum v. Texas Education Agency*[4] reaffirmed the notion that there must be more than theoretical coverage of the curriculum on such tests. In that case, the court partially based its ruling in favor of the State of Texas on the evidence showing that "the [challenged] test measures what it purports to measure . . . [and] all students in Texas have had a reasonable opportunity to learn the subject matters covered by the exam."[5]

---

[2] 644 F.2d 397 (5th Cir. 1981).

[3] *Id.* at 403.

This alignment issue (which is, ultimately, an opportunity to learn issue) is decidedly more complex for students who are not fully proficient in English or who have disabilities. A related yet distinct set of accommodations and alternative testing issues surface as high-stakes testing includes these students.

For students who are not fully proficient in English (often referred to as English language learners or limited English proficient students), educators must ensure that assessment practices mesh with the instructional programs designed to (1) address the students' language abilities *and* (2) allow for content mastery. In short, the way in which these students are assessed for high-stakes purposes cannot be divorced from the overall theory of the educational program provided: symmetry between the educational program (whether it is some form of bilingual instruction or immersion, for instance) and the corresponding testing practices must exist.

Similarly, disabled students who, under federal law, should be educated pursuant to an individualized educational program, must be assessed in a way that is consistent with that program. This means, at a minimum, that the high-stakes testing practices (and the drive toward inclusion of all students in statewide and district-wide programs) cannot be imposed without regard to the terms of these individualized programs and the particular needs of the students individually. See K. Mehfoud, *Special Considerations in High-Stakes Testing, infra*, at 4-1 for more discussion of testing disabled students.)

When establishing high-stakes consequences for students, the issue of notice about the policy changes that will have significant consequences for students is paramount. One federal court has observed: "No one could seriously contend that academic requirements could never be changed during the twelve years a child typically spends in school. It is also obvious that [high-stakes test] requirement[s] could not . . . be[] constitutionally imposed a day prior to graduation. Such late notice could serve no academic purpose."[6] The timing between the establishment of educational objectives related to student advancement and the actual imposition of high-stakes consequences attached to student performance (frequently based on test scores) is important. Clearly, there's a relationship between the notice provided and the kind of opportunity that students have had to master the material or skills tested. Once again, the central legal (and educational) inquiry regarding the students' opportunity to learn drives the analysis. (See R.C. Wood, *Due Process and Discrimination Issues, infra*, at 3-1 for more discussion of due process issues.)

How are new test requirements implemented and interpreted to ensure appropriate educational decision making?

A series of protections may be integrated into the administration of a test and the interpretation of test scores to help eliminate the risk of inappropriately denying (or conferring) educational opportunities to students based on test scores. Those steps include: (1) establishing compensatory or tutorial supports to ensure that all students have the same basic and fair opportunity to master the material tested; (2) providing multiple opportunities to take the test; (3) considering academic factors in addition to the test scores that may affirm or challenge the high-stakes conclusions derived from the test score alone; and (4) using appropriate accommodations to meet the needs of disabled or limited English proficient students.

---

[4] 87 F. Supp.2d 667 (W.D. Tex 2000).

[5] *Id.* at 681-82.

[6] Anderson v. Banks, 520 F. Supp. 472, 506 (S.D. Ga. 1981).

These are all highly contextual practices that inform in very real terms the ultimate fairness of any test instrument. These kinds of protections are premised in part on a recognition that tests are not perfect barometers of learning, and similarly, that conclusions based on those results are not error-free. Given the inevitable presence of the human element in teaching and in learning, there is no guarantee that each student will have received all of the instruction necessary to provide a fair chance for success on high-stakes tests, even where there is alignment among standards, curriculum, instruction and high-stakes tests. Nor is there any foundation upon which one could reasonably conclude that all students can demonstrate what they have learned and what they know equally well on standarized tests. The principles of psychometrics in education recognize these points. Simply, there is no magic to any particular test score. Therefore, there should be ample protections in place to ensure that students are not inappropriately denied meaningful educational opportunities as a result of performance during a single test administration.

What evidence exists regarding the adverse impact of the high-stakes decision making upon discrete groups of students? What history and continuing effects of racial segregation or discrimination exist in the state or school district in question?

The perfect test is not, and cannot be, the enemy of the good test when evaluating and implementing testing practices. Nonetheless, psychometrically sound testing practices and conclusions must guide the development, administration and use of tests designed to further high-standards learning. The evaluation of test results is necessarily a dynamic one: test results can change over time based on a range of factors that may affect those results, such as teaching practices, methods of test administration, and student limitations and needs. As a result, careful monitoring of test inputs and outcomes over time is critical. Importantly, educators should regularly monitor test results to determine if there are significant disparities among student groups, based on race, national origin, gender or disability. Psychometrically and legally, the presence of such disparities should lead to further investigation so that any potential bias or discrimination in the test use can be eliminated.

Similarly, a state's or district's history of *de jure* segregation is central in any determination regarding the imposition of new high-stakes criteria. Such test instruments have the potential to perpetuate (rather than eliminate) continuing effects of past discrimination. One court, in this context, has noted that the otherwise legitimate aim of improving educational standards cannot be viewed in isolation when a school district has a *de jure* history and a subsequent policy of student tracking that perpetuated the segregation. The point is this: If a school system denied full and equal opportunity to a particular group of children by not providing them a level of instruction that ensures a meaningful opportunity to succeed, then the efforts to implement high-stakes measures with impact on individual students must not perpetuate the vestiges of that prior discrimination.

CONCLUSION

As the cases involving discrimination and "unfairness" claims reveal, the educational interest is at the heart of the examination of whether tests are being used in legally appropriate ways. This legal and educational alignment suggests, therefore, a basic foundation for concluding that the promotion of excellence in education can be and should be fully consistent with the promotion of equity and fairness in education. In short, it may be useful to think about the fundamental point of this discussion in very simple (albeit deceptively simple) terms. One court has noted: "An invalid test cannot measure merit."

The relative simplicity of the framework proposed in this article does not suggest that the issues to be addressed are simple or easy. The challenges facing educators struggling to improve the quality of their schools and student performance are many and complex. How can we improve the quality of teaching to better prepare our students for a new century? How can we ensure that schools facing some of the most significant challenges have the necessary resources to help all students achieve to high standards? One step in the right direction is to move beyond the frequently polarizing rhetoric to address the real issues educators face and to identify frameworks and strategies that can be pursued to accomplish the twin educational aims of high standards and fairness.

High standards for academic achievement, when coupled with instruction and support that help students reach those standards—as determined by valid and reliable assessments—can unite students, parents, teachers, administrators and community residents around the shared goal of improving student performance for all. By defining what students should know and be able to do, standards keep schools focused on the desired results for students—and can stimulate local development of appropriate curricula and application of effective teaching strategies to make these results possible and challenge students to learn. Standards also indicate what assessments must measure in order to show achievement.

Although the questions that arise about standards and equity will be as different as the students served by our public schools, a fundamental point should not be lost: all students need an educational system that expects high performance and that offers real and meaningful educational opportunities. As U.S. Education Secretary Riley has often said, "All students have the right to a high quality, high standards education. Nothing less will do."

© 2000 National School Boards Association,
1680 Duke Street, Alexandria, VA 22314.
All rights reserved.

Mr. Coleman is an attorney at Nixon Peabody, LLP, in Washington, D.C. where he provides legal and policy advice to states and school districts regarding the design and implementation of standards-based reforms. He previously served as Deputy Assistant Secretary, U.S. Department of Education, Office for Civil Rights. He may be reached at acoleman@nixonpeabody.com.

The Americans with Disabilities Act

Survey of Case Law Relating to the School Environment

Cynthia Lutz Kelly
Kansas Association of School Boards
1420 SW Arrowhead, Topeka, KS 66604
785-273-3600
cykelly@mindspring.com
NSBA Council of School Attorneys' 2001 Advocacy Seminar
October 26, 2001

I. Duty to Accommodate Disabled Individuals

A. In General

1. The ADA requires employers to make reasonable accommodations to qualified individuals known to have disabilities unless such an accommodation can be shown to impose an undue hardship on business operations.

    (a) Applies to all employment decisions

    (b) Extends to job applicants and all employees, including part-time employees

2. Reasonable accommodation serves the following purposes:

    (a) To remove barriers that prevent people with disabilities from applying for or performing jobs for which they are qualified; and

    (b) To enable employers to expand the pool of qualified workers, allowing them to benefit from the talents of people who might otherwise be arbitrarily barred from employment.

3. *Gammage v. West Jasper School Board of Educ.*, 179 F.3d 952, 136 Ed. Law Rep. 131 (5th Cir. 1999). ADA requires employers to accommodate limitations, not disabilities. ADA does not require an employer to assume an employee with a disability suffers from limitations. In order to bring a successful ADA claim alleging failure to accommodate, the employee must show the employer knew of the employee's substantial limitations.

4. Under the ADA, an employer must be willing to consider making changes in its ordinary work rules, facilities, terms, and conditions in making reasonable accommodation. *Hammer v. Board of Educ. of Arlington Heights School Dist. No. 25*, 955 F. Supp. 921, 116 Ed. Law Rep. 1006 (N.D. Ill. 1997).

5. *Mitchell v. Washingtonville Cent. School Dist.*, 190 F.3d 1, 138 Ed. Law Rep. 82 (2nd Cir. 1999). To make out a prima facie case of discrimination under ADA based on a school district's failure to accommodate, and employee must show:

   (a) He was an individual with a disability;

   (b) The school district had notice of the disability;

   (c) With reasonable accommodation he could perform the essential functions of the job; and

      (i) *Scott v. University of Toledo*, 739 NE 2d 351, 149 Ed. Law Rep. 245 (Ohio 2001). The employee failed to set forth a *prima facie* case. She did not prove she could safely perform essential functions of a heavy-duty custodial job with reasonable accommodation.

   (d) The school refused to make the accommodations

6. The school can defeat the claim if it shows making reasonable accommodation would cause it undue hardship

7. The duty to accommodate does not require an employer to lower its performance standards, reallocate essential job functions, create new jobs or reassign disabled employees to positions that are already occupied. 29 CFR § 1630.2(o)(2).

   (a) *Mescall v. Marra*, 49 F. Supp. 2d 365 (S.D.N.Y. 1999). School district proffered reasons—poor attendance and refusing to follow directives—for terminating a school counselor with alleged mental impairments was not a pretext for disability discrimination. There was no evidence suggesting the school treated her differently than any other similarly situated employee.

   (b) *Weigert v. Georgetown University*, 120 F. Supp. 1, 148 Ed. Law Rep. 888 (D.D.C. 2000). An employer can terminate an employee because of egregious misconduct, whether or not the employee is disabled.

8. An employer can voluntarily go beyond its obligations under the ADA to provide accommodation. The decision to discontinue the accommodation should not subject the employer to liability under the ADA. *Walton v. Mental Health Association of Pennsylvania*, 168 F.3d 661 (3rd Cir. 1999); *Vande Zande v. Wisconsin Department of Administration*, 44 F.3d 538 (7th Cir. 1995) (an employer who "bends over backward" to accommodate should not be "punished for its generosity.")

9. An employer cannot compel a qualified individual with a disability to accept an accommodation if one is not requested or needed by the individual.

10. Most courts have concluded plaintiffs who are "regarded as disabled" are not entitled to reasonable accommodations. See, *Weber v. Strippit, Inc*, 186 F.3d 907 (8th Cir. 1999); *Deane v. Ponoco Medical Center*, 142 F.3d 138 (3rd Cir. 1998)(en banc)(court discussed the issue). But see, *Katz v. City Metal Co.* 87 F.3d 26 (1st Cir. 1996).

II. Determining if an Accommodation is Needed

A. In most circumstances, the employee must request the accommodation, giving the employer notice of the need for the accommodation. Requests for accommodation should be made in a timely manner. An employer must inform job applicants and employees of its duty to make reasonable accommodations under the ADA. 42 U.S.C. § 2000e-10.

1. *Becker v. Gallaudet University*, 66 F. Supp. 2d 16 (D.D.C. 1999). ADA does not impose a general duty on an employer to provide unrequested accommodations. A deaf applicant's failure to request an interpreter for her job interview defeated her ADA claims.

2. *Flemmings v. Howard University*, 198 F.3d 857, 140 Ed. Law Rep. 858 (D.C. Cir. 1999). An underlying assumption of a reasonable accommodation claim under ADA is that the employee has requested an accommodation that the employer has denied. In this case the employee failed to request a change of hours during the period when she suffered from a disability (Meniere's disease) that could have been accommodated. By the time the employee provided a letter from her physician allegedly substantiating her need for the accommodation she was unable to work.

3. *Lowery v. Hazelwood School Dist.*, 244 F. 3d 654 (8th Cir. 2001). A request to be transferred to a school custodian position, made in response to an employee's suspension from a security guard position, was not a request for reasonable accommodation.

B. The EEOC's Enforcement Guidance indicates an employer should initiate the accommodation process if the employer knows or has reason to know that an employee is disabled, is experiencing problems because of a disability, or suffers from a disability that prevents him from asking for an accommodation.

C. ADA requires that an individual inquiry be conducted in determining whether to accommodate an individual. *PGA Tour, Inc. v. Martin*, 535 U.S. ___ (2001).

D. An employee's request for reasonable accommodation under the ADA requires a great deal of communication between the employee and employer. Both parties bear responsibility for determining what accommodation is necessary. *Taylor v. Phoenixville School District*, 184 F. 3d 296, 137 Ed. Law Rep. 116 (3rd Cir. 1999), *on remand*, 113 F. Supp. 2d 770, 147 Ed. Law Rep. 558. Communication between the employer and employee is required because each party holds information the other does not have or cannot easily obtain. *Bultemeyer v. Fort*

370

Wayne Community Schools, 100 F.3d 1281 (7th Cir. 1996). A party that obstructs of delays the interactive process or a party that fails to communicate, by way of initiation or response, may be acting in bad faith.

1. Anyone can make the request for reasonable accommodation; the request does not have to come from the employee. In *Taylor* the request came from the employee's son. A letter from a doctor may also put the school on notice that an accommodation is needed. In *Bultemeyer* the request came from the employee's psychiatrist on behalf of the employee. In *McCafferty v. Cleveland Board of Education*, 133 Ohio App. 3d 692, 144 Ed. Law Rep. 704 (Ohio App. 1999), notice was provided by a letter from a psychiatrist indicating the teacher should be allowed to work in a smaller classroom setting with a few students in light of her back pain that was aggravated by stress and standing.

2. Notice of the need for accommodation does not have to be in writing.

3. Notice does not have to formally invoke the magic words, "reasonable accommodation," but it must be sufficient to convey to the school that the employee is setting forth the need for an accommodation. *Lowery v. Hazelwood School Dist.*, 244 F. 3d 654 (8th Cir. 2001).

4. What the notice must contain is dependent on the employer's knowledge:

    (a) Employer must know of the disability and

    (b) Employer must know of the employee's desire for accommodation.

5. It is not essential that employer know the specific name of the employee's condition. In *Taylor* the principal was aware the employee had serious psychiatric problems that required hospitalization and medication and that she was seeing a psychiatrist after her dismissal from the hospital.

E. Duty to accommodate does not require an employer to excuse an employee from performing the essential functions of a job.

F. An employer need not exempt an employee from the selection and performance standards that relate to essential job functions and that generally apply to personnel assigned to the same position.

III. The Interactive Process: Legal Concepts

A. *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296 (3rd Cir. 1999)(en banc) In order to show an employer has failed to participate in the interactive reasonable accommodation process the employee must demonstrate:

1. The employer knew about the employee's disability;

2. The employee requested accommodations or assistance for his or her disability;

3. The employer did not make a good faith effort to assist the employee in seeking accommodations; and

   (a) The burden is on the employer to request additional information that it believes it needs to make an accommodation. An employer will not be held liable if the employee unreasonably fails to supply the information or does not respond to the employer's request. In *Taylo*r, the court found after the employee's son provided a number of avenues for obtaining additional information from doctors, it was incumbent on the school to ask for the information.

   (b) To show a suggested accommodation is unreasonable an employer cannot merely speculate that a suggested accommodation is not feasible. The employer has a duty to gather sufficient information from the employee and/or qualified experts to determine what accommodations are necessary. *Mustafa v. Clark County School Dist.* 157 F.3d 1169, 129 Ed. Law Rep. 990 (9th Cir. 1998).

   (c) Even if an employer believes that reasonable accommodation is impossible, the employer should not ignore the interactive process. *Mengine v. Runyon*, 114 F.3d 415 (3rd Cir. 1997).

4. The employee could have been reasonably accommodated but for the employer's lack of good faith.

   (a) An employee has the burden of establishing the specific existence of an accommodation at the time the employer allegedly denies it. The employee cannot rely on hypothetical suppositions and conjecture. *McMackins v. Elk Grove Unified School Dist.*, 21 F. Supp. 2d 1201, 130 Ed. Law Rep. 749 (E.D. Cal. 1998).

   (b) *Willis v. Conopco, Inc.*, 108 F.3d 282 (11th Cir. 1997). Where a plaintiff cannot demonstrate a reasonable accommodation, the employer's lack of investigation in to a reasonable accommodation is unimportant.

B. A court seeking to assign responsibility for breakdowns in the interactive process employs a flexible approach, emphasizing principles of good faith and reasonable effort to help the other party determine what specific accommodations are necessary.

   1. Obstructing or delaying the process can be evidence of bad faith as can failing to initiate or respond to communication from the other party. *Salmon v. West*

Clark Community Schools, 64 F. Supp. 2d 850, 139 Ed. Law Rep. 273 (S.D. Ind. 1999).

2. In assessing claims of delay, courts have considered the following factors:

   (a) The length of the delay;

   (b) The reasons for the delay;

   (c) Whether the employer offered any alternative accommodations while evaluating a particular request; and

   (d) Whether the employer acted in good faith.

   See, *Selenke v. Medical Imaging of Colorado*, 248 F.3d 1249 (10th Cir. 2001), and cases cited therein.

3. Where missing information is of the type that can be provided only by one party, the failure to provide the information may be the cause of the breakdown for purposes of assigning liability. *Beck v. University of Wisconsin Bd. of Regents*, 75 F.3d 1130 (7th Cir. 1996). In this case the court concluded the university made reasonable efforts to communicate and provide accommodation based on the information it possessed. However, the employee failed to provide requested information about her medical condition.

C. It is incumbent on the employer to take some initiative in the interactive process. In *Taylor* the court found the school had enough information to put it on notice that the school secretary might have a disability, triggering obligation to participate in interactive process when she or her representative requested accommodation. When accommodations were requested from the district's personnel department, the district had a duty to participate in the interactive process regardless of how much the principal knew about the disability.

D. There is no duty to accommodate an employee if the employee is not disabled. *Swain v. Hillsborough County School Board*, 146 F.3d 855, 127 Ed. Law Rep. 81 (11th Cir. 1998). Any failure by the university to engage in an interactive process with an employee was negated by the fact that the employee was not disabled under the terms of the ADA. *Broussard v. University of California at Berkeley*, 192 F.3d 1252, 138 Ed. Law Rep. 995 (9th Cir. 1999).

E. *Ross v. Indiana State Teacher's Ass'n Ins. Trust*, 159 F. 3d 1001, 130 Ed. Law Rep. 480 (7th Cir. 1998), cert denied, 119 S. Ct. 1113. Administrators of a long-term disability plan did not violate the ADA by cutting off the interactive process. Administrators reviewed a long list of desired accommodations and granted most of them. Employee refused to return to work unless all accommodations were provided. Teachers demand that all teaching meetings be held in his officer to accommodate his degenerative hip condition was unrealistic, given the job requirement that he visit schools.

F. The individual is not entitled to dictate the accommodation to be made. The ADA merely requires implementation of an accommodation that is reasonable in view of all of the circumstances, including technical feasibility and financial considerations. The best accommodation need not be selected so long as the accommodation selected is effective.

IV. Developing an Effective Accommodation Process

A. School districts should establish interactive procedures that formalize the accommodation process.

1. Permit flexibility in the processing of requests.
2. Assure that school officials act expeditiously in providing reasonable accommodation.

B. EEOC Interpretive Guidance suggests four informal steps an employer should undertake to identify and provide an appropriate accommodation:

1. Analyze the particular job involved to determine the purpose of the job and its essential functions.
2. In consultation with the individual with a disability, identify the barriers to performance of the job.
3. Identify potential accommodations and assess each potential accommodation for effectiveness in enabling the individual to perform the essential functions of the job.
4. Assess the reasonableness of each possible accommodation and choose an accommodation that is effective.

C. EEOC Policy Guidance on Executive Order13164: Establishing Procedures to Facilitate the Provision of Reasonable Accommodation, http://www.eeoc.gov/docs/accommodation_procedures.html, applies only to federal agencies, but provides guidance for the development of effective procedures for identifying reasonable accommodations in the school setting as well.

D. Procedures should include

1. Input from the employee with the disability
    (a) Nature of the disability;
    (b) Limitations due to the disability; and
    (c) Proposed accommodations.

2. An opportunity for consulting with experts, when necessary;

3. Discussion of available alternatives with the employee, if the desired accommodation is too burdensome.

E. Document the accommodation process.

1. The suggestions and data provided by the persons who participated in the process;

2. The options that were considered;

3. The reason the option selected was chosen; and

4. The steps taken to implement that accommodation.

V. Types of Accommodation

A. The regulations define reasonable accommodation as any change in the work environment or manner in which a job is usually performed that enables an individual with a disability to enjoy equal employment opportunities. 29 CFR § 1630.2(o).

B. Both the law and the regulations list various examples of the most common types of accommodations an employer may be required to provide.

1. Job Restructuring

(a) Job restructuring means modifying a job so an individual with a disability can perform the essential functions. It may require elimination of non-essential functions, but does not require an employer to eliminate or reallocate essential job functions.

(b) An accommodation that eliminates an essential function is not reasonable. *Frazier v. Simmons*, 254 F. 3d 1247 (10th Cir. 2001).

(c) ADA does not require an employer to create a new position or reallocate job duties to change the essential functions of a job. An employer need not mandate that other employees work longer hours or for a longer period of time to complete essential functions of another individual's job. *Schall v. Wichita State University*, 269 Kan. 456, 146 Ed. Law Rep. 1137 (Kan. 2000).

(d) An employer is not required to create a "light duty" position.

2. Part-time or Modified Work Schedules

(a) Indefinite leave not required. ADA does not require an employer to accommodate an employee who suffers a prolonged illness by allowing him an indefinite leave of absence. Attendance was an essential element of a parochial school teacher's job. Teacher had not been present in his position for more than 18 months prior to his termination, and had not indicated his intent to return to his teaching position to the school administration. *Nowak v. St. Rita High School*, 142 F.3d 999, 126 Ed. L Rep. 109 (7th Cir. 1998). See also, *Scott v. University of Toledo*, 739 NE 2d 351, 149 Ed. Law Rep. 245 (Ohio 2001); *Mitchell v. Washingtonville Cent. School Dist.*, 190 F.3d 1, 138 Ed. Law Rep. 82 (2nd Cir. 1999). An indefinite period of medical leave was not a reasonable accommodation in a case where the plaintiff had already been on medical leave for more than one year, had advised his employer he would never be able to return to his former position and could not advise his employer as to when and under what conditions he could return to any work. *Taylor v. Pepsi-Cola Co*, 196 F.3d 1106, 1108 (10th Cir. 1999).

(b) In some circumstances, leave may be a reasonable accommodation.

  (i) *Hudson v. MCI Telecommunications Corp.*, 87 F.3d 1167 (10th Cir. 1996). An allowance of time for medical care or treatment may constitute a reasonable accommodation. An indefinite unpaid leave is not a reasonable accommodation where the plaintiff fails to present evidence of the expected duration of the impairment.

  (ii) *Rascon v. U.S. West Communications Inc.*, 143 F.3d 1324 (10th Cir. 1998). An employee with posttraumatic stress disorder requested leave to participate in a four-month intensive treatment program. During the term of the treatment, his employment was terminated. The Tenth Circuit noted the leave requested was less accommodating that the company policies required, and concluded the plaintiff's rights under the ADA were violated.

  (iii)Accommodation can include permitting the use of accrued paid leave or providing additional unpaid leave for medical treatment may be a reasonable accommodation. *Lance v. University of Tennessee,* 46 F. Supp. 2d 740, 135 Ed. Law Rep. 482 (E.D. Tenn. 1999).

  (iv)Be aware of rights of the employee under the Family and Medical Leave Act in addition to the ADA.

(c) Shifting arrival and departure times.

(d) Arranging for alternative work sites. EEOC Guidance suggests an employer must modify its policy concerning where work is performed if the change is needed as a reasonable accommodation.

(e) Open-ended work schedules generally are not considered reasonable because they are too disruptive to the workplace. In *Ezikovich v. Commission on Human Rights and Opportunities*, 750 A.2d 494 (Conn.

2000), the court recognized management's need to have a regular and predictable schedule and concluded the modified work schedule offered by the department was reasonable. The employee was not entitled to her preferred accommodation of "work-when-able."

(f) If the schedule is modified to reduce hours, the employer also must consider modifications in the workload.

3. Reassignment to a Vacant Position

(a) The ADA may require an employer to reassign an employee to a vacant position where the disability precludes his or her ability to perform the essential functions of the employee's current job. However, reassignment is not a preferred accommodation, only a last resort. Other accommodations should be considered before transferring an individual to a different position. A vacant position is one that is open at the time of the accommodation or soon to be open.

(b) In cases involving reassignment to a vacant position, an employee must show he can perform the essential functions of an open position; the employer must assist in identifying open positions. *Taylor v. Phoenixville School District*, 184 F. 3d 296, 137 Ed. Law Rep. 116 (3rd Cir. 1999), *on remand*, 113 F. Supp. 2d 770, 147 Ed. Law Rep. 558.

(c) *Smith v. Midland Brake, Inc.*, 180 F.3d 1154 (10th Cir. 1999)(en banc). In an ADA claim for failure to accommodate by offering reassignment to a vacant position, plaintiff must show:

(i) He is a disabled person;

(ii) The preferred option of accommodation within the employee's existing job cannot be reasonably accomplished;

(iii)The employee requested accommodation by reassignment (which the employee may identify or which the employee may request the employer to identify through an interactive process);

(iv)The employee was qualified to perform the vacant job; and

(v) The employee suffered injury as a result of not being offered reassignment.

(d) An employer need not create an opening where none exists.

(i) *Wellington v. Lyon County School Dist.*, 187 F.3d 1150, 137 Ed. Law Rep. 890 (9th Cir. 1999). School district was not required to create a new position in order to reasonably accommodate the physical limitations of a school janitor who developed carpal tunnel disease.

(ii) *Martin v. State of Kansas*, 190 F.3d 1120 (10th Cir. 1999). The State's written job description and post rotation policy reflected the State's judgment that corrections officers are expected to perform a range of duties at a variety of posts, some of which require physical exertion and agility. The State articulated legitimate reasons for having all corrections officers capable of performing duties at all positions. The State was not required to assign the plaintiff to permanent tower duty. ADA does not require an employer to create a new position or even modify an essential function of an existing position in order to accommodate a disabled worker.

(e) There is a split in the courts as to whether reassignment requires more than treating a disabled employee in the same manner as other applicants for an open position.

(i) Reassignment is an accommodation for which disabled employees should have priority. It is required if the individual with a disability is minimally qualified for a vacant position. *Smith v. Midland Brake Inc*, 180 F.3d 1154 (10th Cir. 1999)(en banc); *Aka v. Washington Hospital Center*, 156 F.3d 1284 (D.C.Cir. 1998)(en banc); *Ransom v. State of Arizona Bd. of Regents*, 983 F. Supp. 895, 123 Ed. Law Rep. 143 (D. Ariz. 1997).

(ii) The reassignment obligation means merely that an employer must consider an employee with a disability in the same manner as other non-disabled applicants. The ADA is not a mandatory preference act. EEOC v. Humiston-Keeling, Inc., 227 F.3d 1024 (7th Cir. 2000); Daugherty v. City of El Paso, 56 F.3d 695 (5th Cir. 1995), cert. denied, 116 S. Ct. 1263 (1996); Wernick v. Federal Reserve Bank of New York, 91 F.3d 379 (2nd Cir. 1996).

(f) An employee requesting accommodation is not entitled to the placement of her preference. The ADA does not require an employer either to bump another employee to create a vacancy or to promote an individual with a disability as an accommodation. *Salmon v. West Clark Community Schools*, 64 F. Supp. 2d 850, 139 Ed. Law Rep. 273 (S.D. Ind. 1999). Other cases concluding an employee is not entitled to a promotion as a reasonable accommodation include *Malabarba v. Chicago Tribune Co.*, 149 F.3d 690 (7th Cir. 1998); *Shiring v. Runyon*, 90 F.3d 827 (3rd Cir. 1996); *Milton v. Scrivner*, 53 F.3d 1118 (10th Cir. 1995).

(g) A school district is not required to retrain and assign a disabled head custodian to an entirely different position, such as courier or bus dispatcher, within the school system. *Mitchell v. Washingtonville Cent. School Dist.*, 190 F.3d 1, 138 Ed. Law Rep. 82 (2nd Cir. 1999). However, an employer cannot refuse to provide training that is normally provided to anyone hired for or transferred to the position.

(h) Transfer of an employee solely to be in a different setting or under a different supervision generally is not required. Employers are not required to make transfers to avoid personality conflicts of problems with insubordination. *Weiler v. Household Finance Corp.*, 101 F.3d 519 (7th Cir. 1996); *Wernick v. Federal Reserve Bank of New York*, 91 F.3d 379 (2nd Cir. 1996). In *Kennedy v. Dresser Rand Co.*, 193 F.3d 120 (2nd Cir. 1999), *cert. denied*, 528 U.S. 1190 (2000), the court refused to adopt a per se rule and took the position that whether transfer to a different supervisor may be a reasonable accommodation is to be evaluated on a case by case basis. The plaintiff bears the burden of overcoming the presumption that the request to change supervisors is unreasonable.

(i) If an employee rejects an offered reassignment, the employer is under no obligation to continue offering other reassignments. The ADA does not entitle an employee to a perpetual right to a new position. *Smith v. Midland Brake Inc*, 180 F.3d 1154 (10th Cir. 1999)(en banc).

(j) *Allen v. Rapides Parish School Bd.*, 204 F.3d 619, 142 Ed. Law Rep. 44 (5th Cir. 2000). Transfer of employee to position that constituted a demotion was a reasonable accommodation for an employee with tinnitus.

(k) *Duda v. Board of Educ. of Franklin Park Public School Dist. No. 84*, 133 F.3d 1054, 123 Ed. Law Rep. 63 (7th Cir. 1998) Court struck down requirement that employee inform employer of counseling and medication choices as a condition of continuing employment and involuntary transfer as a reasonable accommodation after the employee was diagnosed as a manic depressive.

4. Acquisition or Modification of Equipment or Devices

   (a) For blind and visually impaired persons;

   (b) For persons with hearing impairments; and

   (c) For persons with limited physical dexterity.

   (d) An employer is generally not required to provide devices that are primarily for the personal benefit of an individual with a disability (e.g., hearing aides, eyeglasses, seeing eye dogs, wheelchairs, and prosthetic limbs) unless the item is specially designed to meet job-related requirements.

5. Adjustment or Modification of Examinations, Training, or Policies

6. Providing Qualified Readers or Interpreters

7. Altering Existing Facilities

8. Other

   (a) Allowing the use of job coach that was paid through other funding. *Miami Univ. v. Ohio Civil Rights Comm.*, 133 Ohio App. 3d 23, 143 Ed. Law Rep. 360 (Ohio App. 1999).

   (b) Transportation.

C. A specific accommodation that is unreasonable with respect to one employer may be considered reasonable for another employer.

VI. Accommodation and Collective Bargaining Agreements

A. Courts have concluded the ADA accommodation requirements do not override the terms of the collective bargaining agreement. *Eckles v. Consolidated Rail Corp.*, 94 F.3d 1041 (7th Cir. 1996), *cert. denied*, 117 S.Ct. 1318 (1997). (the ADA does not require an employer or union to violate the bona fide seniority rights of other employees in order to accommodate a disabled worker) *Kralik v. Durbin* , 130 F.3d 76 (3d Cir. 1997) (accommodation which would breach seniority provisions of a collective bargaining agreement would place "unreasonable burden" on employer).

B. The EEOC, however, has taken a contrary position in its Enforcement Guidance. The EEOC expects employers to bargain in good faith with unions to obtain contract modifications that are needed to accommodate a disabled employee. The EEOC does not explain what employers are supposed to do if unions refuse to agree to such modifications.

C. *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 119 S. Ct. 391, 142 L. Ed. 2d 361 (1998). An employee covered by a collective bargaining agreement may maintain a civil action under the ADA unless the arbitration provision clearly and unmistakably waives the right to do so.

VII. Circumstances in which accommodation may not be required

A. Undue Hardship

   1. *Doe v. Dekalb County School Dist.*, 145 F.3d 1441, 127 Ed. Law Rep. 52 (11th Cir. 1998). In determining whether an employer has made a reasonable accommodation, the court does not ask if an employer has made all the accommodations it feels are appropriate, or whether it has made all of the accommodations the employee desires. Instead the court decides whether a requested accommodation would impose an undue hardship on the employer and does not rely on the employer's feelings regarding a person's disability.

   2. An employer is not required to accommodate an employee if:

(a) The accommodation would require significant difficulty or expense on the part of the employee;

(b) The accommodation would require undue financial and administrative burdens; or

(c) The accommodation would require a fundamental alteration of the nature of the program. 42 U.S.C. §12111(10)(A)& (B).

3. Cost as a justification

   (a) The ADA identifies factors considered relevant to determining if an accommodation is unreasonable in that it would impose an undue hardship on an employer:

      (i) The net cost of the accommodation (In determining the net cost of an accommodation, an employer must consider the employee's willingness to bear some of the cost and the availability of tax breaks and government-sponsored rehabilitation services.);

      (ii) The resources available to the facilities involved in making the accommodation; and

      (iii)The potential impact of the proposed accommodation on the business operations at the facility.

   (b) *Myers v. Hose*, 50 F.3d 278 (4th Cir. 1995). Paid leave in excess of an employee's scheduled amount unjustifiably upsets the employer's settled budgetary expectations and cannot be considered a reasonable accommodation. (Employee requested indefinite leave at half salary).

   (c) Is funding available from other sources?

   (d) Is the employee willing to pay the portion of the cost that constitutes undue hardship?

4. Some courts apply a cost-benefit analysis in determining if an accommodation is "reasonable."

   (a) EEOC indicates an accommodation is "reasonable" if it is effective. The only limitation on the obligation to provide an accommodation is if it would cause undue hardship.

   (b) In *Vande Zande v. Wisconsin Department of Administration*, 44 F. 3d 538 (7th Cir. 1995), the court departed from the EEOC analysis and evaluated whether the proposed accommodation was "reasonable" by weighing the benefits of the accommodation in relation to its costs.

(c) An accommodation is reasonable only if its costs are not clearly disproportionate to the benefits it will produce. *Borkowski v. Valley Central School District*, 63 F.3d 131 (2d Cir. 1995).

5. Some courts have applied this type of cost-benefit analysis to undue hardship. Undue hardship, like reasonable accommodation, is a relational term: the costs the employer must assume are measured in relation to the benefits of accommodation, including the societal benefits of reducing dependency and non-productivity. *Ransom v. State of Arizona Bd. of Regents*, 983 F. Supp. 895, 123 Ed. Law Rep. 143 (D. Ariz. 1997).

B. Threat to Health or Safety—"Direct threat" is "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced through a reasonable accommodation." 29 CFR § 1630.2(r). An employer can require that employees with disabilities not pose a direct threat to the health or safety of themselves or others. 42 U.S.C. §12113(b).

1. If an individual poses a direct threat, an employer must consider if a reasonable accommodation would either eliminate the risk or reduce the risk to acceptable levels.

2. Factors to consider include

   (a) Duration of the risk;

   (b) Nature and severity of the potential harm;

   (c) Likelihood that the potential harm will occur; and

   (d) Imminence of the potential harm. 29 CFR § 1630.2(r).

3. An employer who requires an employee to meet and otherwise applicable federal safety regulation does not have to justify enforcing the regulation solely because application of the standard may be waived experimentally in an individual case. *Albertsons, Inc. v. Kirkenburg*, 527 U.S. 555 (1999). See also, *Daugherty v. City of El Paso*, 56 F.3d 695 (5th Cir. 1995).

4. *Rizzo v. Children's World Learning Center*, 213 F.3d 209 (5th Cir 2000), *cert. denied*, 121 S. Ct. 382 (2000). Whether one is a direct threat is a fact determination for the trier after weighing evidence of the nature of the risk and the potential harm. As with all affirmative defenses, the employer bears the burden of proving the employee is a direct threat. See, also *Hartog v. Wasatch Academy*, 129 F.3d 446, 122 Ed. Law Rep. 401 (10th Cir. 1998). Other circuits place the burden on the employee as part of showing qualification. See, *Moses v. American Nonwovens, Inc.*, 97 F.3d 446 (11th Cir. 1996); *EEOC v. Amego, Inc.*, 110 F.3d 125 (1st Cir. 1997).

5. Infectious and Communicable Diseases

6. Psychiatric Conditions

   (a) An employer need not excuse an employee's violation of work rules that are consistent with business necessity, even if the employee's impairment caused the misconduct.

VIII. Medical Examinations and Testing

A. Preemployment Inquiries

1. The ADA prohibits an employer from requiring applicants to submit to a medical examination or provide information about the applicant's medical history or disability before, or as a condition to, receiving a job offer.

2. May not ask, before making an offer, whether the applicant: (1) has ever filed a workers' compensation claim; (2) has any potentially disabling conditions; or (3) expects to be absent from work for medical reasons.

3. May ask an applicant if he or she is capable of performing the essential functions of a job.

4. May also make a job offer that is contingent upon an applicant being medically certified as able to perform the essential job functions. A written job description should be the reference point used by the medical professional to make that assessment.

   (a) Must uniformly apply any preemployment medical examination requirement so that all employees, not just handicapped individuals, seeking the same job title must be required to submit to an examination.

   (b) *Griffin v. Steeltek, Inc.* 160 F.3d 591 (10th Cir. 1998). A non-disabled individual has a cause of action under the ADA when he or she is asked questions regarding his or her medical history or condition on an employment application form.

5. Post-employment examinations and inquiries regarding an employee's disability:

   (a) Prohibited unless related to job performance

   (b) May require employees to take medical examinations to determine fitness for duty or the ability to perform essential job functions. See, *Martin v. State of Kansas*, 190 F.3d 1120 (10th Cir. 1999)(post-employment inquiries do not violate ADA if they are job-related and consistent with business necessity).

   (c) *Sullivan v. River Valley School Dist.*, 197 F.3d 804, 140 Ed. Law Rep. 127 (6th Cir. 1999), *cert. denied*, 120 S.Ct. 2718. An employer's discretion to order employees to undergo a mental or physical examination is not unbounded. Post-hiring demands for examinations must be supported by significant evidence that could cause a reasonable person to ask if the person is still capable of performing the job. Behavior that is merely annoying or inefficient is insufficient. There must be genuine doubt as to whether the employee can perform essential job functions.

(d) *Miller v. Champaign Community Unit School Dist.*, 983 F. Supp. 1201, 123 Ed. Law Rep. (C.D. Ill. 1997). Where a custodian had exhibited paranoid and agitated behavior, including making baseless accusations against coworkers and threatening to "boobytrap" the office, the psychiatric examination ordered by the school for the custodian was "job related and consistent with business necessity."

(e) *Skaar v. Albuquerque Public Schools,* Unpublished Opinion No. 98-2115 (10th Cir. 5/6/99). Dismissal was an appropriate sanction where the employee refused to submit to a court ordered pulmonary function test during the discovery phase of an ADA action.

B. Drug and Alcohol Testing

1. A test for illegal drugs is not classified as a "medical examination" as defined by the ADA.

2. May require an employee who abuses drugs or alcohol to meet the same performance standards applicable to other employees.

   (a) An employer does not violate the ADA by disciplining employees for using drugs or alcohol in contravention of company policies or rules of conduct. *Maddox v. University of Tennessee*, 63 F.3d 843 (6th Cir. 1995)

IX. Employee Benefit Plans

A. The ADA prohibits discrimination against disabled individuals with respect to employee benefit plans.

B. "So long as every employee is offered the same plan regardless of that employee's contemporary or future disability status, then no discrimination has occurred even if the plan offers different coverage for various disabilities. The ADA does not require equal coverage for every type of disability; such a requirement, if it existed would destabilize the insurance industry in a manner definitely not intended by Congress when passing the ADA." *Kimber v. Thiokol Corp.*, 196 F.3d 1092 (10th Cir. 1999).

X. Enforcement Procedures

A. The ADA incorporates the Title VII administrative and judicial enforcement procedures: a disabled individual may prosecute a civil action after filing a timely discrimination charge with the EEOC.

B. The parties to a civil action under the ADA are entitled to a jury trial where the plaintiff seeks compensatory or punitive damages.

C. Goodman v. Fairbanks North Star Borough School Dist., 2001 WL 856176 (Alaska 2001). A cause of action for failure to accommodate arises when the employee receives unequivocal notice of the facts giving rise to his claim or when a reasonable person would know of the facts.

D. *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795 (1999). Supreme Court resolved a split in the federal courts as to whether an employee was estopped from suing under the ADA after submitting a claim for total disability benefits. In a unanimous decision the Supreme Court held application for and receipt of Social Security Disability Insurance (SSDI) benefits does not automatically stop the recipient from pursuing a claim under the Americans with Disabilities Act (ADA). Further, it does not erect a strong presumption against the recipient's success on the ADA claim. The two types of claims do not inherently conflict to the point where courts should apply a special negative presumption in deciding these cases. The Court suggested there are many situations in which both claims can co-exist. Because the Social Security Administration does not take into account reasonable accommodation in determining SSDI eligibility, the Court noted it might be possible for an ADA plaintiff to claim he could perform the job with reasonable accommodation. This would not be inconsistent with an assertion for SSDI purposes that he could not perform the job without it. However, the Court did require an ADA plaintiff to explain why his or her SSDI contention (too disabled to work) is consistent with an ADA claim he can perform the essential functions of the job, at least with reasonable accommodation. This explanation must be sufficient to warrant a reasonable juror to conclude the plaintiff could perform the essential functions of the job, with or without reasonable accommodation, even assuming the truth of the SSDI statement, or the plaintiff's good faith belief in it.

E. *Butler v. City of Prairie Village Kansas*, 172 F. 3d 736 (10th Cir. 1999). ADA precludes personal capacity suits against individuals who do not otherwise qualify as employers under the statutory definition. The individual defendants in the action could not be held liable for discrimination of retaliation in violation of the ADA.

IDENTIFYING AND RESPONDING TO DISABLED EMPLOYEES UNDER THE AMERICANS WITH DISABILITIES ACT

By

Nancy Fredman Krent and Ellen B. Rothenberg
Hodges, Loizzi, Eisenhammer, Rodick & Kohn
3030 Salt Creek Lane, Suite 202
847/670-9000
nkrent@hlerk.com
erothenberg@hlerk.com

I. WHEN IS AN EMPLOYEE A "*QUALIFIED INDIVIDUAL* WITH A *DISABILITY*"

A "qualified individual with a disability" for purposes of the Americans With Disabilities Act ("ADA") is "an individual with a disability who, with or without a reasonable accommodation, can perform the essential job functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). Thus, two components must be examined: (1) whether the individual has a disability, and (2) whether the individual is qualified for the job.

A. When does an Individual Have a Disability for Purposes of ADA?

An individual has a disability under the ADA when he or she has (1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; or (2) a record of such impairment; or (3) is regarded as having such an impairment. 42 U.S.C. § 12102(2). *School Board of Nassau County v. Arline,* 480 U.S. 273 (1987) (Court found that the plaintiff's lengthy hospitalization for tuberculosis established a record for a substantially limiting impairment); *Olson v. Dubuque Community School District*, 137 F.3d 609 (8th Cir. 1998) (awareness of disability is necessary in order to establish that employer "regarded" employee as disabled); *Sullivan v. River Valley School District*, 197 F.3d 804 (6th Cir. 1999) (requesting a medical examination does not necessarily amount to "regarded as disabled"); *Williams v. Toyota Motor Manufacturing, Kentucky, Inc.* 224 F. 3d 840 (6th Cir. 2000), cert granted, 121 S.Ct. 1600 (April 16, 2001).

1. Physical or mental impairment

    (a) any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting on or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine, 29 C.F.R. § 1630.2(h)1, or

(b) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. 29 C.F.R. § 1630.2(h)2.

(c) *EEOC's Guidance on the ADA and Psychiatric Disabilities*, issued March 25, 1997, lists examples of mental impairments, including: major depression, bipolar disorder, anxiety disorder (panic disorder, obsessive-compulsive disorder, and post-traumatic stress disorder), schizophrenia, and personality disorders.

2. Substantial impairment of a major life activity

In determining whether a plaintiff's impairment substantially limits a major life activity, the Supreme Court has stressed that courts should "determine the existence of disabilities on a case-by-case basis." *Albertsons, Inc. v. Kirkingburg*, 527 U.S. 555, 119 S.Ct. 2162, 2169 (1999).

"Substantially limits" as defined by the regulations, means either:

(a) unable to perform a major life activity that the average person in the general population can perform, or

(b) significantly restricted as to the condition, manner, or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity. 29 C.F.R. § 1630.2(j).

(i) A major life activity includes caring for oneself, performing manual tasks, walking, breathing, seeing, hearing, speaking, learning, and working. The regulations further state that other major life activities include, but are not limited to, sitting, standing, lifting, and reaching. 29 C.F.R. § 1630.2(i). *See Russell v. Clark County School District*, 232 F.3d 896, 2000 WL 982137 (9th Cir. 2000) (unpublished) (diagnosis of asthma alone is not enough to demonstrate a substantial limitation on the major life activity of breathing, without evidence as to the "severity or frequency of the asthma attacks or the effect asthma had generally on life activities).

Compare EEOC Guidance, which extends the definition of major life activity to include thinking, concentrating, interaction with others, performing manual tasks, and sleeping.

(ii) As it applied to the major life activity of *working*, an individual is not substantially limited just because he or she is unable to perform a particular job for one employer, or because he or she is unable to perform a specialized job or profession requiring extraordinary skill, prowess or talent. *See Lewis v. Independent School District No. I-89*, 201 F.3d 448, 1999 WL 1188818 (10th Cir. 1999) (unpublished) (although the plaintiff presented evidence that he was "unable to work around vapors, chemicals, detergents and heat," he did not present evidence showing that this limitation precluded him from performing "either a class of jobs or a broad range of jobs in various classes."

(iii) The "ability to get along with others" is not a major life activity. *Soileau v. Guilford of Maine, Inc.*, 105 F.3d 12 (1st Cir. 1997). *See also Weiler v. Household Finance Corp.*, 101 F.3d 519 (7th Cir. 1996). In *Weiler* the employee claimed that job stress caused her to develop a temporal mandipular joint disorder and that her supervisor caused her anxiety and depression by yelling at her during a review of her job performance. The Seventh Circuit held that the employee was not a qualified individual with a disability concluding that "the major life activity of working is not "substantially limited" if a plaintiff merely cannot work under a certain supervisor."

(iv) Pregnancy itself is not a disability; however, an impairment as a result of pregnancy could be a disability for ADA purposes if it substantially limits a major life activity. In *Garrett v. Chicago School Reform Board of Trustees*, 1996 WL 411319 (N.D.Ill. 1996), the court held that morning sickness associated with pregnancy could be a substantially limiting impairment.

(c) corrective measures and treatment taken into account

The U.S. Supreme Court in *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 119 S.Ct. 2139 (1999), held that the effect of corrective or mitigating measures for a physical or mental impairment must be taken into account when judging whether that person is "substantially limited" in a major life activity. The Court's rationale is based on the exact language of the ADA, that a "disability" exists only where an impairment "substantially limits" a major life activity, not where it "might," "could" or "would" be substantially limiting if mitigating measures were not taken. Thus, severely myopic applicants, who were denied positions as global airline pilots because they failed to meet United's minimum visual requirement, were not disabled within the meaning of ADA, because applicants could fully correct their visual impairment with corrective lenses. *Id.* at 487. *See also Murphy v. United Parcel Service*, 527 U.S. 516 (1999) (whether an employee has a disability under the Act must be evaluated taking into account the employees treated condition); *Taylor v. Phoenixville School District*, 184 F.3d 296 (3rd Cir. 1999) (court analyzed question of whether disability substantially limited a major life activity by taking into account side effects of lithium treatment for plaintiff's bipolar disorder).

B. Who is a *Qualified* Individual With a Disability?

Under the ADA, only persons who are "qualified" for the job in question may state a claim for discrimination. The Supreme Court has stated that a "qualified" person must be "able to meet all of the program's requirements in spite of his handicap." *Southeastern Community College v. Davis*, 442 U.S. 397, 406, 99 S.Ct. 2361 (1979).

1. A qualified individual is one who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires. 29 C.F.R. § 1630.2(m).

2. To be qualified, the individual must be able to perform the essential functions of the job

    (a) essential functions are fundamental job duties that are an inherent, required part of the position in question. 29 C.F.R. 1630.2(n)(1).

    (b) The EEOC has said that a function may be essential because:

        (i) the reason the position exists is to perform that function;
        (ii) there are a limited number of employees available among whom the performance of that job function can be distributed; and
        (iii) the function is highly specialized. 29 C.F.R. § 1630.2(n)(2).

    (c) Evidence of whether a job function is essential includes: the employer's judgment, written job descriptions, time spent on the job performing the function, the consequences of not requiring performance of that function, the terms of any applicable collective bargaining agreements, and work experience of incumbents in the same or similar jobs. 29 C.F.R. § 1630.2(n)(2). *See Brickers v. Cleveland Board of Education,* 145 F.3d 846 (6th Cir. 1998) (court found lifting was an essential function of a bus attendant's job because the attendant would have to lift children in the event of an emergency.)

3. Redistribution of job functions

While an employer may redistribute marginal functions of a job to other employees, an employer is not required to reallocate essential functions that the individual who holds the job would have to perform. *Ozlowski v. Hernderson*, 237 F.3d 837 (7th Cir. 2001).

4. Courts have held that a regular and reliable level of attendance is a necessary element of most jobs.

   (a) In *Tyndall v. National Education Centers,* 31 F.3d 209 (4th Cir. 1994), the court stated that in addition to possessing the skills necessary to perform the job in question, the employee must be willing and able to demonstrate these skills by coming to work on a regular basis. *See also Nowak v. St. Rita High School,* 142 F.3d 999 (7th Cir. 1998). Except in the unusual case where an employee can effectively perform all work-related duties at home, an employee "who does not come to work, cannot perform any of his job functions, essential or otherwise" *Wimbley v. Bolger*, 642 F.Supp. 481, 485 (W.D.Tenn. 1986), *aff'd*, 831 F.2d 298 (6th Cir. 1987), and thus, cannot be considered a "qualified" individual protected by the ADA.

   (b) The Southern District of Florida in *Salmon v. Dade County School Board*, 4 F.Supp.2d 1157 (S.D. Fla. 1998) agreed with the School Board that regular and punctual attendance is an essential requirement for a school guidance counselor. In *Salmon*, the guidance counselor suffered from a back condition – a permanent partial disability of chronic lumbosacral strain. Because of the back condition she was unable to sit or stand for long periods of time and could not climb stairs. After driving her car for long periods of time, Salmon needed to stretch and rest her back. Despite some of the accommodations provided to the guidance counselor, including a special chair, moving her counseling sessions from the second floor to the first, and instructing teachers to walk their students to Salmon's office so that Salmon would not have to walk long distances to meet the students, Salmon requested that she be permitted to arrive at work five to twenty-five minuets late on a regular basis in order to stretch and rest her back after the car ride. The District denied this request, taking the position that she was the only guidance counselor in a school of 1,200 students and that she needed to arrive at school on a regular and punctual basis in order to serve the needs of the children.

5. Examining Individual's Ability to Perform the Job at the Time of the Employment Decision.

   The EEOC's guidance states that the employment decisions must be based on the person's current ability to perform the job, not whether the person might be able to perform the job at some point in the future. See 29 C.F.R. Pt. 1630, App. § 1630.2(m). *See Duda v. Board of Education of Franklin Park Public School District No. 84*, 133 F.3d 1054 (7th Cir. 1998) (Court noted that a determination of whether an individual is qualified should be based on the "individual's capabilities at the time of the employment decision," not on speculation that the individual may be unable to perform the job in the future.). *Koshinski v. Decatur Foundary, Inc.*, 177 F.3d 599 (7th Cir. 1999) (Court noted that the plaintiff must show that he was qualified to perform his physically demanding furnace job "at the time of the employment decision" to terminate him.).

6. If the individual cannot perform the essential functions of the job without accommodation, it is his burden to show that reasonable accommodations by the employer would enable him to perform those functions. *See Mitchell v. Washingtonville Central School District*, 190 F.3d 1 (2d Cir. 1999); *Tyndall v. National Education Centers*, 31 F.3d 209 (4th Cir. 1994).

II. WHAT IS THE INTERACTIVE PROCESS?

The employer's knowledge of an individual's disability combined with a claim of limitation and a request for accommodation is key to the employer's corollary responsibilities. No duty to accommodate, and thus, no liability, attaches if the employee fails to report the disability or the limitation resulting from the disability, or seeks no accommodation. The employer is not expected to assume that every disability results in a limitation that will require a reasonable accommodation. Rather, the employee is expected to engage in an *interactive process* with the employer by disclosing the disability, as well as potential reasonable accommodations.

The interactive process is the method the employee and the employer utilize to determine the appropriate accommodation under the circumstances. The process should identify the precise limitations resulting from the disability and the potential reasonable accommodations that could overcome those limitations. 29 C.F.R. § 1630.2(o)(3). The interactive process must involve both the employer and the employee. 29 C.F.R. Pt. 1630, App. § 1630.9 at 359. *See also Siberns v. Wal-Mart Stores, Inc.*, 946 F.Supp. 664, 670 (N.D. Ind. 1996) (citing *Bultemeyer v. Fort Wayne Community Schools*, 100 F.3d 1281, 1286 (7th Cir. 1996).

A. Notice Which Triggers the Interactive Process

1. Who must make the request for accommodation?

The EEOC compliance manual provides that "a family member, friend, health professional, or other representative may request a reasonable accommodation on behalf of an individual with a disability." 2 *EEOC Compliance Manual*, Enforcement Guidance for Psychiatric Disabilities, at 20-21. The Seventh Circuit in *Bultemeyer* found that an employee's psychiatrist could make a request for accommodations on behalf of an employee. *Bultemyer*, 100 F.3d at 1286. *See also Taylor v. Phoenixville School District*, 184 F.3d at 314 (court allowed son to make the initial request for accommodations).

2. What form must the request take?

The EEOC's manual further provides that "requests for reasonable accommodations do not need to be in writing" 2 *EEOC Compliance Manual*, Enforcement Guidance for Psychiatric Disabilities, at 21, and "to request accommodation, an individual may use 'plain English' and need not mention the ADA or use the phrase 'reasonable accommodation.'" *Id.* at 19. The Seventh Circuit has said that "properly participating in the interactive process means that an employer cannot expect an employee to read its mind and know that he or she must specifically say 'I want reasonable accommodation,' particularly when the employee has a mental illness." *Bultemeyer*, 100 F.3d at 1286. Nonetheless, the notice must make clear that the employee wants assistance for his or her disability. *Taylor v. Phoenixville*, 184 F.3d at 313. Where the employee failed to request an accommodation, the employer was not found to have violated the ADA for failure to provide a reasonable accommodation. *Walker v. Connetquot Central School District,* 216 F.3d 1074, 2000 WL 821745 (2nd Cir. 2000) (unpublished)

B. Application of the Interactive Process Following Adequate Notice

1. Obligations of the parties

(a) Once the employee makes the limitation based on a disability known, the employer has the responsibility to engage in an interactive process to determine what accommodations are reasonable and will allow the plaintiff to function in his/her job. *Beck v. University of Wisconsin Board of Regents*, 75 F.3d 1130, 1135 (7th Cir. 1996).

(b) "An employee's request for reasonable accommodation requires a great deal of communication between the employee and employer"

Bultemeyer v. Fort Wayne Community Schools, 100 F.3d 1281, 1285 (7th Cir. 1996) because each party holds information the other does not have or cannot easily obtain. Thus, both the employer and the employee must act in good faith in working towards the reasonable accommodation. *Feliberty v. Kemper Corp.*, 98 F.3d 274, 280 (7th Cir. 1996).

(c) The burden is placed on the employer to request additional information that the employer believes it needs. However, an employer will not be held liable if the employee unreasonably fails to supply information that the employer needs or does not answer the employer's request for more detailed proposals. *Taylor v. Phoenixville*, 184 F.3d at 317.

2. Employer's failure to participate in the interactive process

The failure of the employer to engage in the interactive process by itself does not give rise to relief. *Ozlowski v. Henderson*, 237 F.3d 837, 840 (7th Cir. 2001). If reasonable accommodation is impossible, nothing more than communication of this fact is required. Nonetheless, if an employer fails to engage in the interactive process, it may not discover a way in which the employee's disability could have been reasonably accommodated, thereby risking violation of the ADA. *See Mengine v. Runyon*, 114 F.3d 415, 420-21 (3d Cir. 1997). "On the other hand, the ADA is not intended to punish employers for behaving callously if, in fact, no accommodation for the employee's disability could reasonably have been made." *Id.* at 420.

3. What constitutes good faith?

Employers can show their good faith in a number of ways:

(a) meet with the employee who requests an accommodation;
(b) request information about the condition and what limitations the employee has;
(c) ask the employee what he or she specifically wants;
(d) show some sign of having considered employee's request; and
(e) offer and discuss available alternatives when the request is too burdensome.

Taylor v. Phoenixville, 184 F.3d at 317. In *Mengine*, the Third Circuit found good faith on the part of the employer when the Postal Service exchanged a number of letters with the employee in an effort to identify a vacant position for reassignment and sent the employee multiple job descriptions of vacant positions. *Mengine*, 114 F.3d at 421.

It is important for the employer to consider and offer as many options as possible, and include the employee in discussions where appropriate, in order to enhance its position in taking part in the interactive process.

U:\Shared\nkrent\NSBA\ADA speech - PUBLICATION VERSION.doc

[SCHOOL DISTRICT NAME]
PHYSICIAN'S CERTIFICATION FORM

Employee:

Physician:

1. Please detail the nature and status of your diagnosis of the employee as it relates to the employee's job as a ________________.

2. Please indicate the expected date of ability to return to work and the impact of this diagnosis/medical condition, if any, as it relates to the employee's performance of his/her job duties.

3. In your professional opinion, is the employee currently able to perform all the essential functions of the position of ______________ (see attached materials pertaining to the functions of this position)?

4. If, in your opinion, the employee is currently unable to perform any one or more of the essential functions of the above positions, please indicate below any accommodations of which you are aware that could be made by the District to enable the employee to perform those functions.

5. Would the performance of the essential functions of the position of ________________________ by the employee create a significant risk of substantial harm to the health or safety of the employee, students, or co-workers? Please base your response upon the most current medical knowledge and/or the best available objective evidence about this employee. Your evaluation of any future risk must be supported by valid medical analyses indicating a high probability of substantial harm if this individual performed the particular functions of the position in question. If it is your opinion that such a risk exists, please detail the specific nature and extent of the harm.

____
Signature of Physician

____
Date

[SCHOOL DISTRICT NAME]

EMPLOYEE MEDICAL CERTIFICATION FORM

Employee:

Physician:

1. Please explain the nature and status of your physician's medical diagnosis as it relates to your job as a ________________.

2. Please indicate your expected date of ability to return to work and the impact of this medical condition, if any, as it relates to your performance of your job duties.

3. In your opinion, are you currently able to perform all the essential functions of the position of ______________ (consider attached materials pertaining to the functions of this position and any other expected duties in your experience):

4. If, in your opinion, you are currently unable to perform any one or more of the essential functions of the above positions, please indicate below any accommodations of which you are aware that could be made by the District to enable you to perform those functions.

____
Signature of Employee

____
Date

RELEASE OF MEDICAL RECORDS AND INFORMATION

By signing below, I authorize __________________________ School District No. ____ to contact my physician, Dr. ____________, to obtain information regarding my medical condition and its impact on my ability to perform my job responsibilities. I authorize Dr. to provide verbal and written information, including medical records, to ______________________ School District No. ___ regarding my medical condition. I understand that this release constitutes a waiver of my rights to confidentiality to the extent stated above, pursuant to the *Medical Patient Rights Act*, 410 ILCS 50/3(d).

Employee Signature

Letter to Teacher from Principal

Dear ____:

In our conversations in the spring and early summer, you expressed concern about wanting additional support from the District with regard to your disability. The District has, as you know, provided a number of accommodations to you.

In an effort to remain responsive to your needs, we would be happy to meet with you at any time to discuss accommodations you may feel that you need. In addition, since you have requested more feedback and suggestions for strategies, the District has asked ________________________ to visit your classroom periodically through the year. She will be able to advise you regarding strategies and modifications to assist you in fulfilling your duties. In addition, her feedback will also assist us in determining if additional accommodations are necessary.

We look forward to a successful school year.

Sincerely,

Principal

SMITH HELMS

ETHICS AND THE SCHOOL ATTORNEY: SELECTED ISSUES

October 2001

NSBA Council of School Attorneys
Advocacy Seminar 2001

James G. Middlebrooks
Smith Helms Mulliss & Moore, L.L.P.
201 North Tryon Street
Post Office Box 31247
Charlotte, North Carolina 28231
Telephone: 704/343-2051
Facsimile: 704/444-8757
gil.middlebrooks@smithhelms.com

Ethics and the School Attorney: Selected Issues
October 2001

James G. Middlebrooks
Smith Helms Mulliss & Moore, L.L.P.
201 North Tryon Street
Charlotte, North Carolina 28202
704.343.2051
gil.middlebrooks@smithhelms.com

I. Ethical Obligations of a Lawyer Representing an Insurance Company and Its Insured, The Board of Education[1]

In a common scenario, the Board of Education has a policy of insurance covering errors and omissions. The policy has a $25,000 deductible, meaning that the school board is responsible for the first $25,000 in defense costs and damages. The policy covers the school board for wrongful termination lawsuits brought by former employees. Your school board has just spent thousands of taxpayer dollars investigating and then discharging a teacher under the applicable state statutes. The teacher sues. Because your firm handled the investigation and prosecution of the case before the school board, it wants you to handle the litigation. Your school board client makes it clear that the former teacher is not to get a penny. The board is prepared to see this through, regardless of the expense. What do you do when you receive the insurance company's litigation management guidelines that conflict with the board's philosophy and instructions?

A. Introduction

In February 2001, the American Bar Association Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 01-421 in which it sought to address the eternal problem of the lawyer's duties to his two clients: the insured and the insurance carrier:

---

[1] Jill C. Griset, an associate with Smith Helms Mulliss & Moore, LLP., contributed greatly to this section of the presentation.

> *A lawyer must not permit compliance with "guidelines" and other directives of an insurer relating to the lawyer's services to impair materially the lawyer's independent professional judgment in representing an insured. A lawyer may disclose the insured's confidential information, including detailed work descriptions and legal bills to the insurer if the lawyer reasonably believes that doing so will advance the interests of the insured. A lawyer may not, however, disclose the insured's confidential information to a third-party auditor hired by the insurer without the informed consent of the insured. Moreover, if the lawyer reasonably believes that disclosure of the insured's confidential information to the insurer will affect a material interest of the insured adversely, the lawyer must not disclose such information without the informed consent of the insured.*

B. The Tripartite Relationship

The relationship between an insurance company, its insured, and the attorney for both parties is often referred to as a "tripartite relationship," and can pose ethical dilemmas for attorneys in such relationships. This relationship can be especially delicate in situations where an attorney is representing a school system and taking direction from the school superintendent, the School Board and the insurance carrier for the school system.

Conflicts may be rare, since the insured client and the insurance carrier are usually seeking a common goal. Nevertheless, the attorney should be aware of her obligations to both clients, and carefully consider the needs of her insured client as well as the insurance carrier throughout the representation.

In the absence of a conflict of interest, some jurisdictions view both the School Board and its insurance carrier as clients. *See, e.g., Paradigm Ins. Co. v. Langerman Law* Offices, 196 Ariz. 573, 576 (Ariz. App. 1999)("if there is no conflict, an attorney-client relationship can be created between an insurer hiring an attorney to represent an insured, despite the lack of an express agreement"); *see generally MGIC Indem. Corp. v. Weisman,* 803 F.2d 500, 504 (9th Cir. 1986); *State Farm Mut. Auto. Ins. Co. v. Federal Ins. Co.*, 86 Cal. Rptr.2d 20, 24-25, 72 Cal.

App. 4th 1422, 1428 (Ca. Ct. App. 1999)(lawyer represents two clients, but "as a practical matter, the attorney may have closer ties with the insurer than with the insured").

In other jurisdictions, only the insured is viewed as the client. *See, e.g., In the Matter of the Rules of Professional Conduct and Insurer Imposed Billing Rules and* Procedures, 2 P.3d 806, 814 (Mont. 2000); *Atlanta Int'l Ins. Co. v.* Bell, 438 Mich. 512, 519, 475 N.W.2d 294, 297 (Mich. 1991); Colorado Bar Association Ethics Committee Formal Op. 107 (September 18, 1999); Florida Bar Staff Op. 20591 (December 31, 1997); Washington State Bar Association Formal Op. 195 (1999).

Still other states attempt to chart a middle course. Under North Carolina ethical rules, while an attorney owes an ethical obligation to both the insurer and insured clients, the insured is the attorney's primary client. *See* North Carolina RPC 56 (April 14, 1989), 98 Formal Ethics Opinion17 (January 15, 1999). In such jurisdictions, the insurer client cannot impose requirements on the attorney that compromises the attorneys' representation of the insured. The insurer, for example, cannot impose guidelines on the attorney that restrain the lawyer's independent professional judgment in representing the insured without the insured's consent. The attorney also may be faced with a situation where the insured's goals conflict with that of the insurance company.

Rule 1.2(a) of the Model Rules of Professional Conduct requires a lawyer to respect a client's decisions concerning the objectives of the representation and to consult with the client concerning how those objectives should be pursued. Comment [1] to the Rule specifically directs the lawyer to defer to the client regarding expenses to be incurred.

Because of the differing interpretations among the states (and internally even within a single jurisdiction), there remains great uncertainty as to whether the insurance carrier may be deemed a "client" who can control the scope and extent of your representation of a local board of education. This uncertainty is present even though most jurisdictions do allow an attorney, in the absence of a conflict, to represent both the carrier and the insured.

Balancing the tightrope between insurer and insured can be difficult. The following is a summary of the ethical guidelines that attorneys representing insurer and insured clients should consider when participating in this delicate tripartite relationship.

C. Compliance with Guidelines Provided by the Insurance Company

Insurance companies have a legitimate interest in keeping their claims adjustment and litigation expenses down. To facilitate this goal, they often require attorneys handling matters on behalf of their insureds to follow billing and litigation management guidelines. Obviously, lawyers must be sensitive to the economic interests of both the carrier and the insured. Lawyers representing both an insurance company and its insured should review such guidelines to determine whether such guidelines will impair the lawyer's ability to provide competent representation to the insured client.

The February 2001 Formal Opinion from the ABA makes it clear that lawyers should not agree to litigation management guidelines "that the lawyer reasonably believes will compromise materially the lawyer's professional judgment or result in his inability to provide competent representation to the insured."

If the insurer, for example, requires that the attorney submit detailed billing reports to the insurer which contain confidential information, the attorney may do so only if he "reasonably believes that disclosure: (1) impliedly is authorized and will advance the interests of the insured in the representation, and (2) will not affect a material interest of the insured adversely." *Id.* Generally, that should not be an issue.

In most situations, however, the lawyer would be well advised to seek the insured's consent to litigation guidelines before undertaking the engagement pursuant to such rules. In some states, informed consent by the insured is required. North Carolina 98 Formal Ethics Opinion 17 (1999), for example, states that the attorney may not submit to certain guidelines imposed by the insurance carrier without obtaining the insured's consent after disclosure. The billing requirements discussed in that opinion stated that the insurer would not pay for the following:

1) summer associate and law clerk time;

2) research exceeding three hours per case (except with prior written approval);

3) making deposition arrangements or arrangements for meetings or conference call;

4) intra-office conferencing and memoranda;

5) trial preparation (i.e., preparation of jury instructions, motions *in limine*, trial notebooks, page/line deposition summaries, etc.) prior to the time a trial date is set; and

6) working on any given day in excess of ten hours, regardless of the number of Insurance Company files on which the timekeeper is working, in the absence of identifiable extraordinary circumstances such as trial, lengthy depositions, and travel.

If the school board's policy authorizes the carrier to control the defense, and to settle the case within policy limits *in the carrier's sole discretion*, the lawyer must communicate those limitations on his representation to the insured at the beginning of the relationship. The lawyer should "make appropriate disclosures sufficient to apprise the insured of the limited nature of his representation as well of the insurer's right to control the defense in accordance with the terms of the insurance contract * * * . No formal acceptance or written consent is necessary. the insured manifests consent to the limited representation by accepting the defense offered by the insurer after being advised of the terms of the representation being offered." ABA Formal Opinion 96-403 (1996)(Obligations of a Lawyer Representing an Insured Who Objects to a Proposed

Settlement Within Policy Limits), Formal and Informal Ethics Opinions 1993-1998 at 406-407. Under the 1996 opinion, once such a communication takes place, the attorney is free to settle the claim within policy limits at the direction of the carrier. Some states, however, require that the lawyer still obtain the informed consent of the insured even under this scenario. *See, e.g.*, *Rogers v. Robson, Masters, Ryan, Brumund and Belom,* 81 Ill.2d 201, 205, 407 N.E.2d 47, 49 (1980); *Miller v. Byrne*, 916 P.2d 566, 574 (Colo. App. 1996).

An attorney faced with such guidelines who is representing a school system should carefully consider the needs of the School Board and Superintendent in the representation. The attorney should consider whether the guidelines will impair the representation, whether any privileges could be waived by complying with the guidelines, and whether the guidelines will interfere with the attorney's independent professional judgment. If the attorney believes that the guidelines will restrain the attorney's independent professional judgment in representing the school system, he should discuss the guidelines fully with the School Board and the Superintendent. The attorney should discuss any benefits and risks to complying the guideline and whether the insurance contract requires compliance with the guidelines. If the School Board and Superintendent agree to the guidelines after full disclosure, the attorney may comply with them.

D. Submitting Attorney Bills to an Outside Auditor at the Insurance Carrier's Request

An increasingly common insurance industry cost-containment tool is the "legal audit" Legal audits run the gamut from scrutiny of the billing statements for errors to demands for original time records, attorney work product, expense and hourly rate benchmarks. In some instances, the "auditors" are employees of the carriers, but increasingly they are employed by third parties.

Under Model Rule 1.6, a lawyer may not reveal information relating to the representation of a client without that client's informed consent with the sole exception of disclosures that are implicitly authorized in order to carry out the representation. Periodic status reports and detailed billing statements being sent to the carrier are common examples of implicitly authorized disclosures. Disclosure of this kind of information usually advances the interests of both the insured and the insurer and thus is implicitly authorized.

A majority of states have concluded that a lawyer may not disclose billing information or other confidential client information to a third-party billing review or audit company at the request of the insurance carrier unless the client (*i.e.*, the insured) has given informed consent. *See, e.g.*, Office of the General Counsel of the Alabama State Bar Op. Ro-98-02 (November 9, 1998); Connecticut Bar Association Committee on Professional Ethics Informal Op. 00-20 (September 26, 2000); District of Columbia Legal Ethics Committee Op. No. 290 (April 20, 1999).

The North Carolina opinion regarding this issue is instructive. In holding that the attorney must obtain the insured's consent before sending her bills to an outside auditor, the North Carolina Ethics Committee stated that:

> Bills for legal services are confidential and can, therefore, only be revealed with the consent of the client or clients affected, but only after consultation with them. Generally, there is no prohibition on submitting a client's legal bills to a third party for review at the client's request after consultation with the client. However a tripartite relationship exists when a liability insurance carrier employs and pays the lawyer to represent and defend its insured.

N.C. 98 Formal Ethics Op. 10 (1998).

Noting that the attorney's primary obligation is to the insured, the Committee states that the insured will not usually benefit from the release of confidential information to a third party. In some cases, such release may in fact waive the attorney-client or work product privileges.

The Committee states that "in general, by consenting, the insured agrees to release confidential information that could possibly (even if remotely) be prejudicial to her or invade her privacy without any return benefit."

Although the opinion states that the attorney may release the bills to the outside auditor with the client's consent, it states that the consent may not be adequate in some situations. In order for the lawyer to determine whether she may properly seek the insured client's consent, the lawyer must ask herself "whether a 'disinterested lawyer would conclude that the client should not agree.'" The Opinion states that

> When the insured could be prejudiced by agreeing and gains nothing, a disinterested lawyer would not conclude that the insured should agree in the absence of some special circumstance. Therefore, the lawyer must reasonably conclude that there is some benefit to [*sic*] insured to outweigh any reasonable expectation of prejudice or that the insured cannot be prejudiced by a release of the confidential information, before the lawyer may seek the informed consent of the insured after adequate consultation.

The Ethics Committee recommends that before making this decision, the attorney should obtain, consider, and review the following:

1) the agreement between the audit company and the insurance company;

2) whether the information provided to the audit company may be shared with another third party, such as another insurance company;

3) how the audit company controls access to the billing information;

4) the level of security provided by the audit company;

5) how the confidentiality of the information is maintained;

6) the assurances given that the confidentiality of the information will be protected;

7) the consequence to the insured client if the release of the information waives the attorney-client or the work product privilege.

The ABA Ethics Committee reached a similar conclusion in ABA Formal Op. 01-421. In that ruling, the Committee also held that the lawyer may not disclose the insured's confidential information to an outside auditor without the insured's informed consent. To obtain that informed consent, the ABA Formal Opinion suggests that the lawyer discuss with the client the following matters:

- the nature of the information sought;
- the relevant legal and non-legal consequences of the client's decision (including a consideration of the insured's duties under its contract of insurance;
- the reasonably foreseeable adverse consequences of disclosure; and
- the risk that the insurance coverage could be lost.

If the insurance carrier provides the attorney with a signed letter from the insured consenting to the release of confidential information to an outside auditor, the attorney still should evaluate the risks to the insured's interests and obtain the insured's informed consent to the disclosure. *See, e.g.,* NC 99 Formal Ethics Opinion 11 (2000).

A school system client is often concerned about the release of information concerning disputes or litigation to the press. Thus, attorneys for school system clients must carefully consider the potential release of information that may or may not be privileged, but that may result in leaks to the press that may harm the school systems' interests. If a disinterested lawyer would not agree to releasing the information to an outside auditor, the attorney should not counsel the school system client to do so.

E. Conclusion

Representing both the insurance carrier and the insured can involve a delicate balancing act for the attorney. This is especially true when the attorney is representing a school system, which may involve balancing conflicting goals of the School Board and the Superintendent in addition to the insurance carrier. Attorneys in such a situation should carefully review all of the relevant ethical rules during the representation and carefully consider both its insured and insurer clients' goals and interests to ensure that all of the clients' interests are adequately protected.

II. "YOU'VE GOT MAIL!" – THREE POWERFUL WORDS

Urban myths abound as to how misdirected e-mails have changed the course of personal history. Stories about how the e-mail of the sexual affair was sent to a company-wide distribution list instead of to a single intended recipient or other examples can be found to demonstrate the powerful nature of a single mistaken click of a mouse button.

As attorneys increasingly communicate electronically, there is an ever-increasing need for pause and reflection. The pros and cons of communicating through e-mail with one's adversaries and clients are beyond the scope of this section. Instead, this section focuses on the duties of two lawyers: the sender and recipient.

Consider the following hypothetical: After a long and messy investigation into a teacher's wrongdoings, the Superintendent asks the school system's counsel to map out her strategy for presenting the case for dismissal to the Board of Education along with a frank assessment of the strengths and weaknesses of the Superintendent's position. The teacher, having sensed her predicament, long ago hired counsel. In a fit of hurry, the school system's lawyer clicks on the wrong address in her electronic address book and sends the strategy memo to her opposing counsel instead of the Superintendent. What to do?

Both the sending and receiving lawyers face a number of professional and ethical obligations once they discover an inadvertent disclosure of confidential information. The sender breached his duty to keep client information confidential. The recipient has newly discovered information that would help him in the zealous representation of the client but which he might not be able to use because of other ethical obligations.

The first issue, which now seems somewhat dated, is whether attorneys should be e-mailing at all. There is, of course, an issue of client privacy. The ABA in 1999 concluded that "a lawyer may transmit information relating to the representation of a client by unencrypted e-mail sent over the Internet without violating the Model Rules of Professional Conduct (1998) because the mode of transmission affords a reasonable expectation of privacy from a technological and legal standpoint." ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 99-413 (1999). Many states have adopted substantially the same position.

The sender of the misdirected e-mail has potentially disclosed confidential client information. Her immediate duty is to attempt to "retrieve" the inadvertently disclosed material by contacting the unintended recipient and informing him of the mistake.

In Formal Opinion 92-368, the ABA sated that a "lawyer who receives material that on their face appear to be subject to the attorney-client privilege or otherwise confidential, under circumstances where it is clear they were not intended for the receiving lawyer, should refrain from examining the materials, notify the sending lawyer and abide the instructions of the lawyer who sent them." Among the states, there seems to be clear agreement on one point: counsel who receives confidential information must promptly notify the other lawyer.

There is not, however, agreement on what the recipient must do or whether the inadvertent disclosure constitutes a waiver of the attorney-client privilege. For example, a District of Columbia Ethics Committee advised that a lawyer may retain and use such inadvertently disclosed material if he as already reviewed them before learning that the disclosure was inadvertent. That opinion was based in part on evidentiary law in the District that inadvertent disclosure is a waiver of the privilege. District of Columbia Ethics Opinion 256 (1995). Kentucky lawyers are encouraged to follow the ABA approach but will not be disciplined for using inadvertently disclosed materials. Kentucky Ethics Opinion E-374 (1995). Maine also allows the receiving lawyer to use the disclosed information. Maine Ethics Opinion 146 (1994).

III. Contacts Of School Employees By Opposing Counsel

Hypothetical: You represent the school district in a contentious special education or employment case. You learn that opposing counsel is contacting current school employees to interview them about the facts of the dispute. You instruct opposing counsel to deal only through you and to stop contacting school staff. Opposing counsel insists that she has breached no ethical prohibition. Who wins?

Rule 4.2 of the ABA Model Rules of Professional Conduct states:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Questions to ponder:

- How much authority does the school staff member have over the matter at issue?
- Could his actions be attributed to the school district?
- Can the staffer make decisions that legally obligate the district?
- Are the employee's admissions legally binding as to the district?
- If employees are named in the litigation, have they been sued in their official capacity, individual capacity, or both?

The Children's Internet Protection Act

Edwin C. Darden
Senior Staff Attorney
National School Boards Association
(703) 838-6712
Edarden@NSBA.org

CIPA: THE CHILDREN'S INTERNET PROTECTION ACT

by Dorman Walker*

The Children's Internet Protection Act (CIPA), Pub. L. 106-554 § 1(a)(4), requires school boards to institute an "Internet safety policy" restricting access to the Internet by students and adults. CIPA also requires schools to use "technology protection measures" to block and filter Internet access to certain visual depictions. Failure to take actions to comply with CIPA will result in loss of E-Rate discounts.

FCC regulations to implement and enforce CIPA for E-Rate discounts became effective April 20, 2001. Schools that receive E-Rate discounts for Internet access and services should undertake immediate actions to comply with CIPA, and must send the FCC certification of efforts to comply postmarked no later than Saturday, October 27, 2001. CIPA imposes similar access restrictions on schools that receive funding under Title III of the Elementary and Secondary Education Act. However, the US Department of Education's CIPA enforcement regulations for ESEA funds will not be published until FY 2002, which begins October 1, 2001.

CIPA is one of several attempts by Congress to make the Internet safer for children. The 1996 Communications Decency Act prohibited indecent communications over the Internet, and was held unconstitutional by the US Supreme Court in 1997. The Children's Online Protection Act, passed in 1997, prevents commercial Web sites from providing "harmful to minors" content to minors. It was held unconstitutional in a decision by the US Third Circuit Court of Appeals that will be reviewed this Fall by the Supreme Court. CIPA's constitutionality as applied to libraries – but not as applied to schools – is being challenged by the American Library Association and the ACLU.

CIPA's Internet Safety Requirements

The CIPA-mandated Internet safety policy must address the following issues: (1)access by minors to inappropriate matter on the Internet and World Wide Web, (2) the safety and security of minors when using electronic mail, chat rooms, and other forms of direct electronic communications, (3) unauthorized access, including hacking, to information regarding minors online, (4) unauthorized disclosure, use, and dissemination of personal information regarding minors, and (5) measures designed to restrict and monitor access by minors to content harmful to minors.

Before adopting an Internet safety policy, a school board must provide reasonable public notice and hold at least one public hearing on the proposed policy. The policy must apply to all computers with Internet access, including those that are not accessible by the public. The CIPA-mandated technology protection measures must include a measure that protects against Internet access by adults to visual depictions that are obscene or child pornography, and a measure that protects against Internet access by minors to visual depictions that are obscene, child pornography, or harmful to minors. CIPA allows school staff to disable blocking or filtering software for an adult user engaging in bona fide research or other lawful purposes.

Undertaking Actions to Comply with CIPA

Schools receiving E-Rate discounts for Internet connections and services should immediately undertake actions to comply with CIPA. For the current E-Rate Year Four, this is accomplished by the following actions: (1) publishing or circulating a school board agenda with CIPA compliance cited as a topic, (2) a circulating staff meeting agenda with CIPA compliance cited as a topic, (3) requesting and receiving a Service Provider's quote for information on a technology protection measure, (4) drafting an RFP or other procurement procedure to solicit bids for the purchase or provision of a technology protection measure, (5) documenting with an agenda or minutes a meeting at which an Internet safety policy was discussed, (6) documenting in an agenda or minutes holding a school board meeting at which procurement issues relating to the acquisition of a technology protection measure were discussed, (7) writing a memorandum to an administrative authority of a school from a staff member outlining the CIPA issues not addressed by the school's current Accessible Use Policy, (8) writing a memorandum to an administrative authority of a school from a staff member describing research on available technology protection measures, or (9) drafting a memorandum to an administrative authority of a school from a staff member which discusses and analyzes the Internet safety policies in effect at other schools and libraries.

Certifying CIPA Compliance

Any entity that receives an E-Rate discount must comply with CIPA in order to continue receiving the discount. Generally, the entity responsible for applying for the E-Rate discount must provide certification. This may be the individual school. However, because individual schools may not have the authority to make legally binding commitments, the relevant school board, local education agency, or other authority responsible for the administration of the school should make certification. Certification is made by submitting a modified FCC Form 486 (Receipt of Service Confirmation Form). The certification must state that the entity requesting the E-Rate discount (1) has complied with the requirements of CIPA, or (2) has not yet complied for Funding Year 4 but is undertaking actions including procurement to comply for the next funding year, or (3) that CIPA does not apply because discounts are only being received for telecommunications services. For the Funding Year 4, which started July 1, 2001, most entities will certify that they are undertaking actions to comply.

Modified FCC Forms 486 must be postmarked by October 27, 2001. Technically, the statutory deadline is Sunday, October 28, 2001. However, the FCC has indicated that certifications postmarked October 29 will be considered untimely, rendering the effective date of compliance October 27, 2001. It is important to note that even though certification for Funding Year 4 is not required until October 28, 2001, a school that receives discounted services between July 1, 2001 and October 28, 2001 must be taking actions to comply with CIPA *at the time it receives the discounted services.* For future funding years, certification is due according to existing program guidelines.

Penalty for Noncompliance

A school that knowingly fails to submit certifications is not eligible for discounted services until proper certification is submitted. Furthermore, even though the procedure for receiving discounts under the E-Rate universal support mechanism does not provide funds directly to schools, but instead to eligible service providers who then provide discounted services to schools, schools that are found to be noncompliant with CIPA will have to reimburse the universal support mechanism directly. If a school subsequently comes into compliance with CIPA, it will again be eligible for E-Rate discounts, but not for the period it was out of compliance. CIPA prohibits recipients from obtaining discounts under the universal support mechanism for the purchase or acquisition of technology protection measures necessary for CIPA compliance.

For More Information

- The citation for the final regulation is: 66 Fed. Reg. 19394 (April 16, 2001).
- A detailed Report and discussion of the new rules are available at:
  http://www.fcc.gov/Bureaus/Common_Carrier/Orders/2001/fcc01120.doc
- Informational websites:
  http://www.safewiredschools.org (Consortium for School Networking)
  http://www.nsbf.org (National School Board Foundation)
  http://www.ala.org/cipa (American Library Association)
- FCC Forms are available at:

http://www.sl.universalservice.org/form

- Sample Internet safety policy
  http://www.mcoecn.org

*Dorman Walker is a partner with Balch & Bingham LLP in Montgomery, Alabama. Used with permission.

The Children's Internet Protection Act
(CIPA)

David R. Boyd
BALCH & BINGHAM LLP
Post Office Box 78
Montgomery, Alabama 36101-0078
334/834-6500
dboyd@balch.com

______Used with Permission.

1. CIPA: A Summary

2. Important Definitions

3. What is Not Required by CIPA

4. Steps to CIPA Compliance

CIPA: A Summary

What is CIPA?

The Children's Internet Protection Act (CIPA), 47 U.S.C. § 254 (h), (l), as amended, provides a set of standards for Internet Safety that schools and libraries must comply with in order to maintain eligibility for E-Rate discounts on Internet access, Internet services and internal connection services. The safety policy requires schools to use Internet filtering & blocking technology (technology protection measures) and to develop a set of substantive policy decisions related to Internet access. Regulations to implement and enforce CIPA were adopted by the Federal Communications Commission March 30, 2001 and became effective April 20, 2001.

What are the Internet Safety Standard Requirements?

The filtering & blocking technology, technology protection measures must include:

- A measure that protects against Internet access by adults to visual depictions that are obscene, or child pornography
- A measure that protects against Internet access by minors to visual depictions that are obscene, child pornography, or harmful to minors
- The Internet safety policy must also include monitoring of online activities of minors

The Internet safety policy adopted and enforced must address the following issues:

- Access by minors to inappropriate matter on the Internet and World Wide Web,
- The safety and security of minors when using electronic mail, chat rooms, and other forms of direct electronic communications,
- Unauthorized access, including so-called "hacking," and other information regarding minors online;
- Unauthorized disclosure, use, and dissemination of personal information regarding minors; and
- Measures designed to restrict minors' access to materials harmful to minors.

What are the Other Requirements?

The school or library seeking certification must also provide reasonable notice and hold at least one public hearing on the proposed Internet safety policy. The policy applies to all computers with Internet access, including those that are not accessible to the public. Furthermore, CIPA does allow school or library staff to disable blocking or filtering software for an adult user engaging in bona fide research or other lawful purposes.

Who must provide Certification?

Any entity that receives an e-rate discount must comply with CIPA in order to continue receiving the discount. Generally, the entity that is responsible for applying for the E-Rate discount must provide certification. This may be the individual school or library. However, because individual schools and libraries may not have the authority to make legally binding commitments, the relevant school board, library board, local education agency or other authority responsible for the administration of the school or library should make certification. In the case of consortia, the individual schools and libraries will provide a certificate of compliance to the Billed Entity, then the Billed Entity will provide that it received certification from the individuals.

How is Certification Made?

Certification by Individual Entities

Certification made by the appropriate school or library authority should be made on a modified FCC Form 486 "Receipt of Service Confirmation Form". The certification must state that the entity requesting the E-Rate discount: 1) Has complied with the requirements of CIPA, or 2) Has not yet complied for the present funding year but is undertaking actions including procurement to comply for the next funding year, or 3) That CIPA does not apply because discounts are only being received for telecommunications services. For the Funding Year 4, starting July 2, 2001, most entities will certify that they are undertaking actions to comply.

Certification by the Billed Entity of a Consortium

In the case of consortia, individual members of the consortium should complete the new Form 479 "Certification to Consortium Leader of Compliance with the Children's Internet Protection Act" . The Billed Entity must then file a Form 471 "Consortium application" that states either 1) that the Billed Entity has collected a signed Form 479 from all eligible members of the consortium, or 2) that CIPA does not apply because discounted services are for telecommunications services only. Furthermore, the Billed Entity must also complete a Form 486 making one of the three above-listed certifications. Finally, since the Billed Entity makes certification only that it has received the required forms from the individual consortium members, it is not required to verify that members' certifications are accurate.

What is the Deadline for Certification?

For Funding Year 4 (July 1, 2001-June 30, 2002), entities must provide certification postmarked by October 27, 2001. (Technically, the statutory deadline is Sunday, October 28, 2001. However the FCC has indicated that certifications postmarked October 29 will be considered untimely, rendering the effective date of compliance October 27, 2001.) It is important to note that even though certification for Funding Year 4 is not required until October 28, 2001, any school or library that receives discounted services between July 1, 2001- October 28, 2001 must be taking actions to comply with CIPA *at the time it receives the discounted services.* For future funding years, certification is due according to existing program guidelines.

What is considered "Undertaking Actions to Comply"?

The School & Libraries Division (SLD) provided specific guidance for Year 4 Undertaking Actions Certification. A school could undertake and document the following types of actions in order to meet the requirement.

- A published or circulated school or library board agenda with CIPA compliance cited as a topic.
- A circulated staff meeting agenda with CIPA compliance cited as a topic.

- A Service Provider quote requested and received by a recipient of service or Billed Entity which contains information on a Technology Protection Measure.
- A draft of an RFP or other procurement procedure to solicit bids for the purchase or provision of a Technology Protection Measure.
- An agenda or minutes from a meeting open to the public at which an Internet Safety Policy was discussed.
- An agenda or minutes from a public or nonpublic meeting of a school or library board at which procurement issues relating to the acquisition of a Technology Protection Measure were discussed.
- A memo to an administrative authority of a school or library from a staff member outlining the CIPA issues not addressed by an Accessible Use Policy currently in place.
- A memo or report to an administrative authority of a school or library from a staff member describing research on available Technology Protection Measures.
- A memo or report to an administrative authority of a school or library from a staff member which discusses and analyzes Internet Safety Policies in effect at other schools and libraries.

What is the Penalty for Non-compliance?

Schools and libraries that knowingly fail to submit certifications are not eligible for discounted services until proper certifications are submitted. Furthermore, even though the procedure for receiving discounts under the universal support mechanism does not provide funds directly to schools and libraries (but instead to eligible service providers who then provide discounted services to schools and libraries) schools and libraries that are found to be non-compliant with CIPA will have to reimburse the universal support mechanism directly.

In the case of non-compliance by an individual entity within a consortium, only the non-compliant entity will be required to reimburse the universal support mechanism for its proportional share of the discounts. The entire consortium will not be penalized.

If a school or library entity subsequently comes into compliance with CIPA, it will again be eligible for discounts, but not for the period it was out of compliance.

Can we use funding from the Universal Support Mechanism to comply with CIPA? No, CIPA clearly prohibits recipients from obtaining discounts under the universal support mechanism for the purchase or acquisition of technology protection measures necessary for CIPA compliance.

Where can I get more Information?

- The citation for the final regulation is: 66 Fed. Reg. 19394 (April 16, 2001).
- A detailed Report and discussion of the new rules are available at:
  http://www.fcc.gov/Bureaus/Common_Carrier/Orders/2001/fcc01120.doc
- Informational websites:
  http://www.safewiredschools.org (Consortium for School Networking)
  http://www.nsbf.org (National School Board Foundation)
  http://www.ala.org/cipa (American Library Association)
- FCC Forms are available at:
  http://www.sl.universalservice.org/form

IMPORTANT DEFINITIONS

"Child Pornography" as defined in 18 U.S.C. § 2256.

(8) "child pornography" means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where--

(A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;

(B) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct;

(C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or

(D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct.

"Harmful to Minors" as defined in 47 U.S.C. § 254 (h)(7)

(G) Harmful to minors
The term "harmful to minors" means any picture, image, graphic image file, or other visual depiction that--
(i) taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excretion;
(ii) depicts, describes, or represents, in a patently offensive way with respect to what is suitable for minors, an actual or simulated sexual act or sexual contact, actual or simulated normal or perverted sexual acts, or a lewd exhibition of the genitals; and
(iii) taken as a whole, lacks serious literary, artistic, political, or scientific value as to minors.

WHAT IS NOT REQUIRED BY CIPA

- Compliance with CIPA is not required for entities receiving only telecommunications services. However, these entities should indicate this on Form 486.

- No certification of the effectiveness of the Internet safety policy or technology protection measures is required.

- CIPA does not require that the selected filtering & blocking technology work perfectly. CIPA does not penalize recipients of discounts who act in good faith to implement available filtering & blocking software and does not evaluate whether the technology protection measures are fully effective.

- Schools and libraries are not required to publicly post the Internet safety policy including: the key requirements of CIPA, the text of the written Internet safety policy adopted, the name of the vendor of the technology protection measure chosen, or instructions on registering complaints.

- Schools and libraries are not required to compile or report on the specific information about the workings of technology protection measures: such as instances of efforts to access blocked material.

- While CIPA allows library or school staff to disable the blocking & filtering technology for adults doing bona fide research, CIPA does not promulgate rules mandating how entities may implement the provision. Such determinations are to be left to the local communities.

- CIPA does not create a private right of action against schools or libraries for failure to comply. The most severe penalty involves repayment of discounts for the periods out of compliance.

STEPS TO CIPA COMPLIANCE

(1) Develop an Internet Safety Policy *that*:

Includes procurement of filtering & blocking technology that has:

G A measure that protects against Internet access by adults to visual depictions that are obscene, or child pornography

G A measure that protects against Internet access by minors to visual depictions that are obscene, child pornography, or harmful to minors.

G The Internet safety policy must also include monitoring of online activities of minors.

and creates a Policy that addresses the following issues:

G Access by minors to inappropriate matter on the Internet and World Wide Web

G The safety and security of minors when using electronic mail, chat rooms, and other forms of direct electronic communications

G Unauthorized access, including"hacking", and other unlawful activities by minors online

G Unauthorized disclosure, use and dissemination of personal information regarding minors

G Measures designed to restrict minors' access to material harmful to minors.

(2) Hold a Public Hearing on the proposed Internet Safety Policy

(Reasonable notice should be provided to the public.)

(3) Begin Implementation of Policies and Procurement as soon as possible

(Any school or library that receives discounted services between July 1, 2001- October 28, 2001 must be taking actions to comply with CIPA at the time that it actually receives these services, even though certification is not due until October 28, 2001.)

G A published or circulated school or library board agenda with CIPA compliance cited as a topic.

G A circulated staff meeting agenda with CIPA compliance cited as a topic.

G A Service Provider quote requested and received by a recipient of service or Billed Entity which contains information on a Technology Protection Measure.

G A draft of an RFP or other procurement procedure to solicit bids for the purchase or provision of a Technology Protection Measure.

G An agenda or minutes from a meeting open to the public at which an Internet Safety Policy was discussed.

G An agenda or minutes from a public or nonpublic meeting of a school or library board at which procurement issues relating to the acquisition of a Technology Protection Measure were discussed.

G A memo to an administrative authority of a school or library from a staff member outlining the CIPA issues not addressed by an Accessible Use Policy currently in place.

G A memo or report to an administrative authority of a school or library from a staff member describing research on available Technology Protection Measures.

G A memo or report to an administrative authority of a school or library from a staff member which discusses and analyzes Internet Safety Policies in effect at other schools and libraries.

(4) Submit Required Certification by October 27, 2001

G Form 486 "Receipt of Service Confirmation Form"

(for both individual entities and consortia)

G Form 471 "Consortium Application"

(only for a Billed Entity of a consortium)

G Form 479 "Certification to Consortium Leader of Compliance with the Children's Internet Protection Act"

(only for individual members of a consortium)

Federal News-

CHILDREN'S INTERNET PROTECTION ACT REQUIRES SCHOOLS TO FILTER

On December 21, 2000 the Children's Internet Protection Act became law. Included as part of the Consolidated Appropriations Act, 2001, P.L. 106-554, the law requires school districts to adopt Internet safety policies as a condition of receiving funds under the Elementary and Secondary Education Act (20 U.S.C. § 7001) or universal service discounts under section 254 of the Communications Act of 1934 (47 U.S.C. § 254). The act takes effect on April 20, 2001.

Policies Required under ESEA

Schools that receive funds under ESEA but do not receive universal service discounts must certify, as part of the application process, that they have in place an Internet safety policy which includes the use of filtering devices on computers with Internet access, thereby blocking entry to "visual depictions that are obscene or child pornography." With respect to minors, the filter must also protect against access to materials that are "harmful to minors." Schools must certify that they are also enforcing the use of these technology protection measures during any use of computers with Internet access. The filter may be disabled by an administrator, supervisor, or other authorized person for "bona fide research or other lawful purpose."

If a recipient of ESEA funds fails to comply with these requirements, the Secretary of Education may withhold further payments, issue a complaint to compel compliance, or enter into a compliance agreement with the recipient.

Policies Required under Communications Act

A school with Internet enabled computers may not receive universal service discounts under the Communications Act unless it certifies to the Federal Communications Commission (FCC) that it has adopted, implemented, and is enforcing an Internet safety policy. (47 U.S.C. § 254(h)(5)) The policy must include the same filtering components as required under the ESEA, as well as monitoring of the online activities of minors. During adult use, the filter may be disabled for "bona fide research or other lawful purpose." Failure to submit the annual certification to the FCC will make the school ineligible for service at discount rates. A school that fails to ensure use of its computers in accordance with the certification re-quirements must reimburse any funds or discounts received for the period covered by the certification.

As a condition of receiving universal service discounts, schools must also adopt and implement an Internet safety policy that addresses (1) access by minors to inappropriate materials on the Internet; (2) safety and security of minors when using electronic mail, chat rooms, and other forms of electronic communication; (3) unauthorized access ("hacking") and other unlawful activities by minors online; (4) unauthorized disclosure, use, and dissemination of personal identification information regarding minors; and (5) measures designed to restrict minors' access to materials harmful to minors. (47 U.S.C. § 254(l)) Schools must hold at least one public hearing before adopting the policy. The types of materials considered inappropriate for minors will be determined by the local school board. Schools must make this policy available to the FCC upon request. -

INTERNET POLICIES REQUIRED TO RECEIVE FEDERAL FUNDS

ESEA-To get ESEA funds schools must:

- Adopt Internet safety policy requiring filters
- Use filters that block access to obscenity, child pornography and materials harmful to minors
- Enforce use of filters
- Allow disabling of filters only for research or other lawful purpose

Communications Act-To qualify for universal service benefits schools must:

- Adopt Internet safety policy requiring filters and monitoring of online activities of minors
- Use filters that block access to obscenity, child pornography and materials harmful to minors
- Enforce use of filters and monitoring requirements
- Allow disabling of filters during adult use only for research or other lawful purpose
- Address issues related to minors in Internet safety policy:
  - -access to inappropriate material, including material harmful to minors
  - -safety and security in using electronic communications
  - -hacking and other unlawful activities
  - -unauthorized disclosure, dissemination and use of personal identification information

Children's Internet Protection Act (CIPA)

What is CIPA?
The Children's Internet Protection Act (CIPA) was signed into law on December 21, 2000, and released as Federal Communications Commission (FCC) Report and Order #01-120 on April 5, 2001. Passed as part of a major federal funding bill, H.R. 4577, the new law requires K-12 schools and libraries to implement filtering or blocking technology for all computers with Internet access, and develop and implement an Internet Safety Policy. The law affects funding available through the Library and Service Technology Act, as well as Title III of the Elementary and Secondary Education Act (ESEA). CIPA also affects E-rate funding – the Universal Service discount program administrated by the Schools and Libraries Division (SLD).

How might CIPA affect our school's E-rate funding?
Schools have until October 28, 2001 to certify that they are in compliance with CIPA provisions or are undertaking action toward compliance for the following funding year. CIPA applies specifically to funds received during Year Four, which began on July 1, 2001, and all following years. Funds will not be released for Year Four until the recipient has certified CIPA compliance.

What constitutes compliance?
There are essentially three main components to CIPA compliance:

1. Install blocking or filtering software or services on all computers with Internet access (the "Technology Protection Measure") or take measures toward this component.
2. Implement an Internet Safety Policy that addresses the points below.
3. Hold a public meeting discussing Internet Safety Policy and/or Technology Protection Measures.

During Year 4, schools will be considered compliant so long as they are "undertaking action" to become compliant by Year 5.

An applicant's Internet Safety Policy must address the following issues:

Internet Safety Policy Issues

- Access by minors to inappropriate matter on the Internet and World Wide Web
- The safety and security of minors when using electronic mail, chat rooms, and other forms of direct electronic communications (e.g., instant message services)
- Unauthorized access, including so-called "hacking," and other unlawful activities by minors online
- Unauthorized disclosure, use, and dissemination of personal information regarding minors
- Measures designed to restrict minors' access to materials harmful to them.
- A plan to monitor minors' use of the Internet in school.

This Internet Safety Policy must require the use of filtering or blocking software or services on all computers with access to the Internet.

How do we undertake action toward CIPA compliance?
The following are just a few suggestions for actions a school or school association can take toward CIPA compliance.

- Publicize and hold at least one school or library board meeting listing CIPA compliance on the agenda
- Publish a Request for Proposals (RFP) to solicit bids for filtering or blocking technology
- Revisit your Acceptable Use Policy and ensure that it addresses Internet Safety
- Attend a training program on CIPA compliance
- Write a memo analyzing the school's Internet Safety Policy or describing research on Technology Protection Measures (filtering software, blocking services, etc.) and distribute to school or library administrative authorities.

Important: Organize and retain documentation of all meeting minutes, vendor research, requests for proposals, etc.

How do we submit certification?
Schools and libraries must certify CIPA compliance using a new version of FCC Form 486, to be submitted after a decision is made on requests for discounts through the SLD, and postmarked no later than October 28, 2001. School and library consortia must use a new form, FCC Form 471, which is currently available for download on the SLD Web site.

What if our school fails to comply?
Any school that knowingly fails to comply with the application guidelines for annual submission of required certification will not be eligible for funding under this program. Any school that knowingly fails to ensure the use of its computers in the manner prescribed by CIPA will be subject to enforcement action by the Commission, up to and including full reimbursement of funds received in violation. However, at any time, a school or library deemed ineligible for discount services may reestablish eligibility for discounts by providing the required certifications to the SLD and FCC.

KEY DATES

July, 1, 2001
Schools must have undertaken action toward CIPA compliance before service start date.

October 28, 2001
Schools that have applied for Year Four (July 1, 2001 – June 30, 2002) E-rate funding for Internet access, Internet service, or internal connections must certify that they have "undertaken actions" to comply with CIPA.

Where can we find more information?

Schools and Libraries Division of the USAC
http://www.sl.universalservice.org
888-203-8100

The American Library Association's CIPA Web page
http://www.ala.org/cipa/
800-545-2433

The Consortium for School Networking (CoSN)
http://www.cosn.org
202-466-6296, ext. 15

Download the complete text of the FCC Order and Report
http://www.fcc.gov.Bureaus/Common_Carries/Orders/2001/fcc01120.doc

"Although the ALA and ACLU lawsuits raise important questions about CIPA's constitutionality, the lawsuits are limited to the public library context. Schools must 'undertake action' towards compliance in order to receive critical ed-tech funding through the E-rate and ESEA. I would urge all members of the community, including parents, board members, and school legal counsel to participate in discussions around CIPA compliance to clarify the community's position on managing Internet access and teaching Internet safety in schools and libraries."

Liza Kessler, senior policy counsel for Leslie Harris & Associates.

"We have attempted to craft our rules in the most practical and efficacious way possible, while providing schools and libraries with maximum flexibility in determining the best approach. We conclude that local authorities are best situated to choose which technology measures and Internet safety policies will be most appropriate for their relevant communities."

FCC, CIPA Report and Order

This report was co-authored with eChalk, a leading provider of Web-based communication services for K-12 schools and districts. www.echalk.com

GET A FREE WEBSITE! | LOGIN
GET UP TO 100MB
SEARCH
Lose
THE MOS
FARES
ORB

National School Boards Association

Excellence and equity in public education through school board leadership

Home: Federal Action: Children's Internet Protection Act: Effect on Schools

How does this effect your school?

Since the two federal funding programs and thus two federal agencies are involved the requirements vary a bit. But if your school receives either source of funding, you must use filters that block access to obscenity, child pornography, and other material which may be harmful to students.

What are the specific requirements for funding under ESEA?

What are the specific requirements for E-rate benefits?

What happens if the school doesn't comply?

What about the free speech rights, like in the COPA cases?

What are the specific requirements for funding under ESEA?

Virually all American public schools receive funding under ESEA which provides money for schools to offer a number of remedial services for low income children. Schools who receive ESEA must:

- Adopt Internet safety policies
- Use filters that block access to obscenity, child pornography, and other material that may be harmful to minors
- Enforce the use of filters (Schools must certify that they are neforcing the use of filters during any Internet access.)
- Allow filters to be disabled only for research or other lawful purposes. (Filters may be disabled by an administrator, supervisor, or other authorized person for "bona fide research or other lawful purpose.")

What are the specific requirements for E-rate benefits?

The Schools and Libraries Universal Service Fund, popularly know as "e-rate", was created as part of the Telecommunciations Act of 1996 to ensure that all eligible schools and libraries in the United States have affordable access to modern telecommunication and information services. All K-12 schools and public libraries qualify for e-rate discounts. The amount of the discount is dependent on the percentage of low income students served in the school.

The e-rate funds can be used for a school or library's internal connections, telecommuncations services, and Internet access. Although the funding will not pay for desktop compuers, learning software or teacher/librarian training, schools and lobraries can use the funds they save on telecommunications infrastructure to support these elements of a comprehensive technology plan.

Check out furher E-rate information and applications or file those forms online.

For schools to continue to receive e-rate benefits they must:

- Adopt Internet Safety Policies requiring filters. Schools must hold at least one public hearing before adopting the policy. The local school board will determine the types of materials considered inappropriate for minors. Schools must make this policy available to the FCC upon request.
- Use filters to block obscenity, child pornography, and other material that may be harmful to minors
- Enforce the use of filters
- Allow disabling fo filters only for research or other lawful purposes
- Address issues related to minors in Internet safety policy
  - Access to inappropriate material, including material harmful to minors
  - Safety and security in using electronic communications
  - Hacking and other unlawful activities
  - Unauthorized disclosure, dissemination and ise of personal identification information

What happens if the school doesn't comply?

Schools who do not certify that they have policies to protect children online risk the loss of their ESEA funding. The Department of Education can compel a district to comply, enter into an agreement pending compliance, and ultimately has the authority to cut off federal funds if the school district does not comply with the statute.

Schools who do not certify CIPA compliance will not be eligible for e-rate benefits. In addition, the school must return e-rate funds or discounts received during the time the school was required to, but did not, certify

CIPA compliance.

What about the free speech rights, like in the COPA cases?

Although students have the right to speak and receive information within the public schools, those rights are never absolute and are further modified when it involves children in a public school setting. Schools have the right ti inly allow speech within the schools that does not disrupt or harmful to students. Further, if the speech is within the public school curriculum they do not have to allow speech that is pervasively vulgar or inappropriate from an educational perspective.

However, in another context the filtering requirement has been challenged. In March 2001 these claims were brought in a federal district court, American Library Ass'n v. United States, and Multnomah County Public Library v. United States. In these cases the filtering requirement of this law as it applies to libraries were challenged as a violation of free speech. As a result of this litigation public libraries will have until July 2002 to comply. But read the case for yourself.

USAC Schools & Libraries

USAC | High Cost | Low Income | Rural Health Care | Schools and Libraries

Site Tour | FAQs | Contacts | Get Help!

SL Forms

All SLD forms are available for download, including **Service Provider Forms**. If a form is available in multiple formats, each formats icon will appear in the "Download" column. Once you have determined which format you need, click on the icon for the form to open in your web browser otherwise you can save a local copy by right-mouse clicking on the icon. Files saved as XLS may be downloaded and viewed using a spreadsheet application. Files saved as PDF may be typed into directly on the computer and then printed out for your convenience. Should you need additional assistance, guidance is available on-site at **"How to Download PDF Files"**.

Forms are available in three formats:

- 📄 Adobe Acrobat
- X MS Excel
- W MS Word

Applicant Forms

Please visit **Applying for Discounts: Step-by-Step** under **Applicants** for guidance on filling out these forms.

Form #	Description	Download	Instructions
Form 470	1st SLD Form which describes the services you are seeking	(be sure to download both PDF files for the Form 470) 📄 Download 1 📄 Download 2 X	📄
Form 471 - YEAR 4	2nd SLD Form which describes the services ordered (Funding Year 4 Form 471 must be used to request Year 4 services)	📄 X	📄
471 Cost Calculation Grid	Use to Complete Block 5 of Form 471	X	W

How to Apply
Service Providers
Reference Area
SLD Forms
Funding Commitments
Site Map

Apply Online!
View Forms

Search Site
Enter Keyword
go
Get the most out of your search query by viewing **Search TIPS!**

BEST COPY AVAILABLE

Form 479 NEW!	Certification by Administrative Authority to Billed Entity of Compliance with the Children's Internet Protection Act	📄 W	📄
Form 486 NEW!	SLD Form which indicates receipt of services ordered	📄 W	📄
Form 500	Adjustment to Funding Commitment & Modification to Receipt of Service Confirmation Form	📄 W	📄
Form 472 BEAR	Used for seeking discounts on services already paid	📄	📄

Service Provider Forms

Please download the instructions and read carefully for guidance on filling out the Service Provider forms.

Form #	Description	Download	Instructions
Form 499-A	Universal Service Worksheet - for telecom providers	📄 X	📄 W
Form 498	Service Provider Information Form - for obtaining a SPIN	X	📄
Form 473	Service Provider Annual Certification Form	📄	📄
Form 474 NEW! *New Online Submission Capability!*	Service Provider Invoice Form **(This form can now be submitted online by clicking on the "SUBMIT" button within the PDF form.)**	📄	📄

Go back to Previous Page

FAQs | Contacts | Get Help! | Site Tour
How to Apply | Service Providers | Reference Area | SL Forms | Funding Commitments | Site Map
Schools & Libraries | High Cost | Low Income | Rural Health Care | USAC

1997- 2001 © , Universal Service Administrative Company, All Rights Reserved

Advising Clients on Effective Student Discipline Policies: What is the Balance Between Due Process/Equity and Zero Tolerance?

D. Patrick Lacy, Jr.
Reed Smith Hazel & Thomas LLP

Richard Schwartz
Schwartz & Shaw

I. The Setting

II. Statements from National Associations

Department of Education/Department of Justice

National Association of Elementary School Principals

National Association of State Boards of Education

National School Boards Association/Office of General Counsel

III. Review of Circuit Court Cases

IV. Sample Policies

Drug and Alcohol Use by Students – Topeka Public Schools, Topeka, KS

Student Conduct – Kentucky School Boards Association, Frankfort, KY

Student Discipline – Michigan Association of School Boards, Lansing, MI

Student Discipline – National School Boards Association

Weapons in School – Hopkins School District 270, Hopkins, MN

V. Additional Resources

SCENARIO

The Board of Education of Rapid Fire Junction, citing an upsurge in school violence nationwide, and wanting to avoid adding its name to the list of school systems that have been victimized by horrific events, has decided to adopt a clear, simple zero tolerance policy. While the Board is united in its desire to send a strong message to the entire community, there is less than complete agreement as to what should be included in its new zero tolerance policy. Indeed, now that the Board is about to adopt a policy, it is finding there is some measure of disagreement as to the meaning of "zero tolerance."

The proposed "Zero Tolerance Policy" is straightforward and inclusive. It reads as follows:

PROPOSED
ZERO TOLERANCE POLICY

> The Board of Education believes that assuring a safe school environment is its most important responsibility. Therefore, the Board is adopting a "zero tolerance" position on all conduct or activities that are inherently dangerous or illegal in the school environment. Any student found to have violated this policy shall be suspended from school immediately for ten (10) days, and recommended for long-term suspension for up to one year, or expelled.

Fortunately (or, perhaps, unfortunately) for the Board, two of its veteran members, Mr. Lacy and Mr. Schwartz, also happen to be attorneys. By virtue of their profession, they usually presume a special expertise in any matters coming before the Board that may have legal implications. And, because of their high rank and standing in the community, they often lead the debate on many issues being considered.

Recently, Mr. Lacy and Mr. Schwartz were heard to agree that they are opposed to terrorism. That, however, is the only matter in anyone's memory upon which they are believed to have agreed.

The Chairman of the Board of Education, Dr. Julie Underwood, is leading the Board through a series of questions and issues to help determine what will be included in the final version of the zero tolerance policy. We have been invited to listen in on the discussion.

The establishment and enforcement of sound and equitable discipline policies are essential for creating and maintaining safe, disciplined, and drug-free schools. School discipline policies should be part of a larger effort to build constructive, orderly learning environments in which all teachers can teach effectively and all children can achieve high educational standards. Sound and equitable school discipline policies are those that:

- Focus on prevention and are coordinated with prevention strategies and other education programs;
- Apply to all students;
- Are enforced consistently and equitably;
- Are clear and understandable;
- Are developed with the participation of school staff, students, and parents;
- Are broadly disseminated;
- Ensure due process is provided;
- Are consistent with applicable Federal, State, and local laws, including the Individuals with Disabilities Education Act;
- Ensure teachers are adequately trained to manage their classrooms effectively; and
- In cases where students are suspended or expelled from school, provide appropriate supervision, counseling, and educational services that will help those students meet the educational standards of the State.

To be effective, school discipline policies cannot be created and implemented in isolation. They need to be part of a comprehensive strategy including other efforts, such as drug and violence prevention programs, early childhood

---

Serious Offenses Need Strong and Fair Responses

As a part of a broader prevention and discipline strategy, school districts will need to respond to serious offenses that may be committed by students. An example of an appropriate policy response to serious offenses by students, such as bringing firearms to school, is embodied in the Gun-Free Schools Act (GFSA). Under GFSA, each State receiving Federal funds under the Elementary and Secondary Education Act (ESEA) must have a State law that requires all local education agencies (LEAs) in the State to expel from school for at least one year any student found bringing a firearm to school. State laws must also authorize the LEA's chief administering officer to modify any such expulsions on a case-by-case basis. The GFSA also requires that it be construed in a manner consistent with the Individuals with Disabilities Education Act. In its reauthorization proposal for the ESEA, the Administration would require that suspended or expelled students (including those expelled under the GFSA) receive appropriate supervision, counseling, and educational services that will help those students meet the educational standards of the State.

The GFSA policy includes important elements that are part of an appropriate response to a serious offense. It prescribes a very serious sanction, but it limits this strategy to a very serious student violation and provides discretion to local officials on a case-by-case basis. The Administration's reauthorization proposal also recognizes that denial of educational and other needed services should not be used to punish unacceptable student conduct.

> ***"[W]e propose that all school districts have 'sound and equitable discipline policies.' Children should, when suspended or expelled, receive 'appropriate supervision, counseling and educational services so they can meet state standards.' ...I urge Congress to make this change. It ought to be a basic American principle that no student should be punished by being denied an education." [Statement by Secretary Richard W. Riley, December 8, 1999]***

education, family strengthening programs, school security and law enforcement efforts, mental health assessment and referral, and education reform efforts. Further, effective school discipline policies must balance student accountability with educational responsibility. Such policies must ensure that every student is held accountable for his/her actions, while ensuring that suspended and expelled students are provided with appropriate educational services. Students who are suspended or expelled should receive counseling and supervision to ensure that suspensions and expulsions do not increase the risk of students engaging in inappropriate activities, and to help students reintegrate into the school community.

In addition, school discipline policies must be consistent with Federal civil rights laws—developed and administered in a manner that does not discriminate based on race, national origin, gender, or disability.

The data show that suspension rates have increased substantially over the last 25 years and that there are sizeable disparities in suspensions and expulsions by race. Whatever the cause of the increase and disparities, they raise important concerns. To the extent the increase in suspensions reflects an increase in student misconduct, it highlights the need to promote sound discipline policies designed to enhance school safety and prevent misconduct before it occurs. To the extent the increase in suspensions reflects an increase in the use of suspensions for conduct that previously would not have resulted in such action, it raises concerns for the students who are being more readily excluded from the educational program.

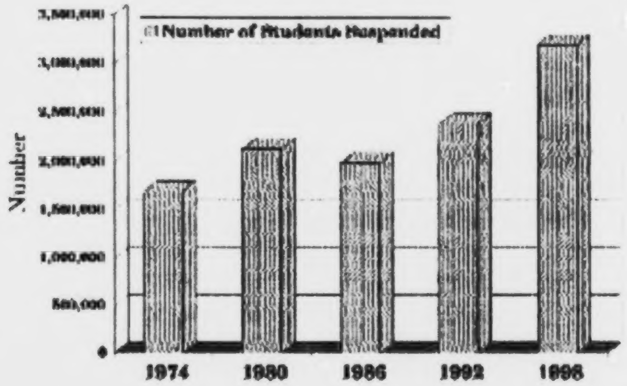
Finally, to the extent racial disparities in suspension and expulsion rates result from either different treatment of minority students relative to other students for similar offenses or the implementation of policies that have an unjustified disparate impact by race, they raise important civil rights concerns. Disparity in outcome alone does not equal discrimination, but a significant disparity triggers the need for further inquiry to ensure that a given policy is in fact nondiscriminatory.

The data for this section of the Annual Report were collected by the U.S. Department of Education, Office for Civil Rights (OCR). The data were collected as part of OCR's Elementary and Secondary School Civil Rights Compliance Reports, which are based on surveys of schools and school districts on a variety of civil rights issues. The survey has been conducted approximately every two years since 1968. Information on suspensions has been collected since 1974, and information on expulsions has been collected since 1998. The data in the Report are national projected values based on survey results.

Significant numbers of students are suspended, and this number is increasing.

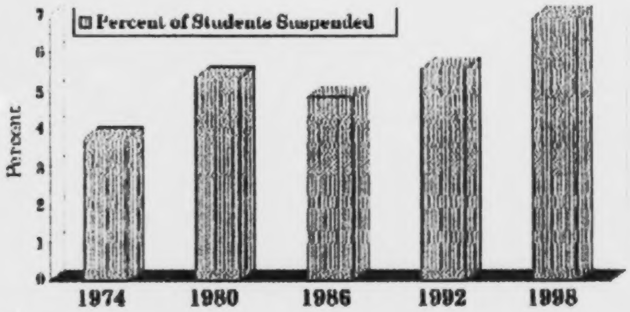
Suspension rates have been increasing steadily since data were first collected in 1974. In 1974, approximately 1.7 million students (or

Figure 32: Number of Students Suspended: 1974, 1980, 1986, 1992, and 1998



Source: Office for Civil Rights, Elementary & Secondary School Civil Rights Compliance Report.
Note. The data in this figure are national projected values based on survey results.

Figure 33: Percentage of Students Suspended: 1974, 1980, 1986, 1992, and 1998



Source: Office for Civil Rights, Elementary & Secondary School Civil Rights Compliance Report
Note: The data in this figure are national projected values based on survey results.

3.7% of all students) were suspended at least once for one day or more. In 1998, that number had risen to approximately 3.1 million students (or 6.9% of all students) (see Figures 32 and 33). This increase has been experienced by all racial groups (see Figure 34).

There are long-standing disparities in suspensions by race.

The data show consistent disparities in suspensions among certain racial and ethnic groups, especially among African-American male students. In 1974, African- American students made up approximately 15 percent of student enrollment, but they made up approximately 29 percent of the students who were suspended. In 1998, African-American students accounted for approximately 17 percent of student enrollment, but approximately 33 percent of the students who were suspended. This disparity is particularly acute among African-American male students, who comprised approximately 9 percent of student enrollment but made up approximately 21 percent of students who were suspended in 1998 (see Figure 35). It is also important to note that for each racial group, males make up the majority of suspensions.

Smaller percentages of students are expelled, but there are disparities here as well.

Expulsion is utilized much less frequently than is suspension. Approximately 87,000 students were expelled in 1998 (0.2% of all students). During the 1997-1998 school year, a small number of these students (3,523) were expelled for bringing a firearm to school (see Figure 10). The disparity found in suspensions is also found in expulsions. In 1998, African-American students accounted for approximately 17 percent of student enrollment, but approximately 31 percent of the 87,000 students who were expelled. This disparity is particularly acute among African-American male stu-

"Giving up on troubled young people makes for a missed opportunity—they deserve more than being dismissed or ignored. Strong alternative programs and strategies such as these funded [by the U.S. Department of Education] can reduce the factors that lead young people into poverty and crime and encourage them to stay in school, graduate and become productive members of society." [Secretary Riley, Press Release, August 10, 2000]

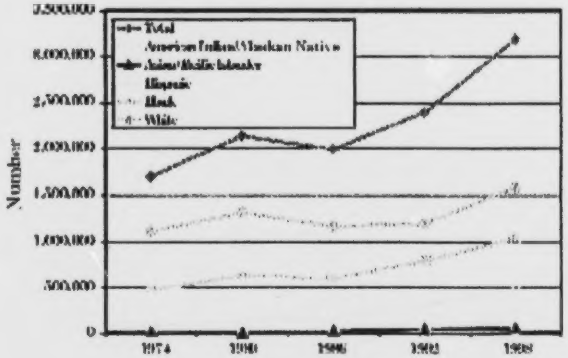
dents. African-American male students comprised approximately 9 percent of student enrollment, but made up approximately 23 percent of expulsions.

Actions are being taken.

The U.S. Department of Education is aware of the negative impact that suspensions and expulsions can have on an individual student and on the community, and is working to promote school safety and the development of sound and equitable discipline policies. This requires actions in a number of areas, including development of effective prevention and early intervention programs; leadership; parental support; teacher training; identification of model policies; comprehensive data collection; and vigorous enforcement of civil rights laws. Accordingly, the U.S. Department of Education has engaged in several activities, including the following:

- *Reauthorization of the Elementary and Secondary Education Act:* Title XI would require State Education Agencies to have a policy that requires its local education agencies to have in place and implement sound and equitable discipline policies, in order to ensure a safe, orderly, and drug-free learning environment in every school.
- *Model School Discipline Policy Manual:* The National School Boards Association in partnership with the U.S. Department of Education, is developing a School Discipline Policy Manual for school officials. The manual will include an overview of key policy development practices, expert commentary on policy content, and case studies of discipline policies and practices that have been found to be effective.
- *Discretionary Grant Program on Alternative Strategies to Reduce Student Suspensions and Expulsions and Ensure Educational Progress Program:* The U.S. Department of Education provided more than $10 million of funding to support 16 school districts and other nonprofit groups

Figure 34: Number of Students Suspended, by Race-Ethnicity: 1974, 1980, 1986, 1992, and 1998



Source: Office for Civil Rights, Elementary & Secondary School Civil Rights Compliance Report

NAESP
PRINCIPAL
ONLINE

National Association of Elementary School Principals

Home | Members Only | What's New | Site Map | Search | Jobs

Principals' Perspective

Vincent L. Ferrandino, Executive Director, NAESP
Gerald N. Tirozzi, Executive Director, NASSP

Zero Tolerance: A Win-Lose Policy

Every school day, principals struggle to protect youngsters while at the same time working to make sure they receive the best education possible. We cannot tolerate violence against our students and staffs.

We must be thoughtful but aggressive, with clear policies that are understood by students and their parents. These policies must be fairly administered with due process assurances in place.

However, we may want to refine our policies to make sure they address three critical areas:

- consideration should be given for age and grade level;
- the punishment should fit the "crime;" and
- educational services should never stop.

Both NAESP and NASSP support bills in the House and Senate that would require states and schools to provide alternative educational services, supervision, and counseling for any student who is expelled.

We must also be honest and fair. If a mistake is made or a reaction is too severe, we should admit it and work to correct it. However, we should not have to apologize for upholding our communities' expectations for safe, orderly, and drug-free schools.

Zero tolerance is not new, and it didn't start in schools. In fact, it emerged in the 1980s as states and the federal government fought illegal drugs. Soon after, school systems began using similar policies in their fight against drugs. By 1994, the Safe- and Drug-Free Schools and Communities Act required schools that received federal funds to expel students who brought weapons or drugs to school. During this time public opinion polls began saying that schools were seen as unsafe and undisciplined. Americans were demanding that schools do whatever it took to assure students' safety.

In response, school districts spent a great deal of time, effort, and funds on everything from conflict resolution programs to metal detectors. They also broadened their zero tolerance policies to include harassment, fighting, gang activity, toy weapons, any drugs, threats of violence, and hate offenses.

A Conundrum

Defending zero tolerance policies represents a conundrum for school principals. On the one hand, principals are expected to protect all students in schools and clearly articulate the type of behavior that is not acceptable. At the same time, the press seems to be unrelenting and vociferous in its attacks on school principals for enforcing these policies. Recently, zero tolerance was again thrown into the national spotlight when six high school students from Decatur, Illinois, were expelled for brawling. Immediately, the print, broadcast, and Internet editorialists rehashed every news-making zero tolerance incident—children suspended or expelled for bringing nail clippers or mouthwash to school, for scribbling threats or scary messages, for writing horror stories, and so on—in which principals had followed their school board policies and/or procedures.

Ironically, almost no news reports praised schools for their safety efforts. Little was heard of how many dangerous incidents at schools had been avoided, or whether students felt safer as a result of these get-tough policies. Instead, schools were accused of taking the easy way out, hiding behind their rules, and using a one-size-fits-all approach to discipline. Papers were full of phrases like "draconian punishment" and "zero tolerance, zero sense." Accusations that school authorities "ignored the needs of these troubled youth" or that schools were "scared stupid" surfaced on TV and in syndicated columns.

A Better Way

Do the outraged media have a point? Of course. Should we take another look at zero tolerance and put back some professional judgment in the decision making? Yes. Is there a better way to assure safety for all students and prevent random acts of violence? Not yet! All the studies by law enforcement agencies (including the FBI and Secret Service), think tank reports, safety summits, government decrees, and a minor industry that has developed around school safety, have yet to find that way.

If ever there were a time to support the outstanding women and men who are providing tireless and conscientious leadership to insure safe, orderly, and drug-free environments, now is that time! The press and others make a case for students' rights. We too believe strongly in students' rights as clearly stated in our Declaration of Independence—life, liberty, and the pursuit of happiness. Above all else, students have a right to live!

Zero tolerance policies are far from perfect, but they're working in thousands of school districts today. We believe they send a strong message that helps students feel safe in school. The very moment that this society becomes safe for our children, we'll be delighted to zero out zero tolerance in our nation's schools.

Vincent L. Ferrandino, Executive Director
National Association of Elementary School Principals

Gerald N. Tirozzi, Executive Director
National Association of Secondary School Principals

Education Week, January 26, 2000

417

Home

About Us • Conventions • Corporate Partners • Events Calendar • Government Relations • International Services
Join NAESP • News & Views • EDMarket • Members Only • Principals' Network • Professional Development
Publications • Recognition Programs • Research & Links • Services Center • Special Interests • Student Services

© 1996-2001 • National Association of Elementary School Principals • 1615 Duke Street, Alexandria, VA 22314
800-38-NAESP [800-386-2377] • (703) 684-3345 • FAX 800-39-NAESP [800-396-2377]
naesp@naesp.org

NAESP

NASBE
NATIONAL ASSOCIATION OF STATE BOARDS OF EDUCATION

POLICY UPDATE

Vol. 9, No. 1 A Publication of the POLICY INFORMATION CLEARINGHOUSE February 2001

Zero Tolerance Policies

Since 1994, when Congress passed legislation requiring states to stipulate a one-year expulsion for any student carrying a firearm on school property, all states and 80 percent of districts have devised "zero tolerance policies" against a host of violent behaviors in schools. Modeled upon zero tolerance policies in the criminal justice system that require mandatory minimum sentences for individuals convicted of violent and drug-related crimes, these policies usually require schools to suspend or expel students who participate in behaviors for which the district or state has "zero tolerance."

Although zero tolerance policies for students were initially intended to curb the prevalence of weapons in schools, less than half of all states and even fewer districts currently limit their zero tolerance policies to weapons-related infractions. On the contrary, in most states zero tolerance policies have been written to include *non*violent behavior such as drug possession, defiance of authority, habitual profanity, defacing school property, and gang-related behavior on school campuses.

Despite the widespread adoption of zero tolerance policies, they are not without detractors. These critics point out that zero tolerance policies often take troubled students who need the most adult guidance and supervision and give them the least by turning them out of safe, supervised school environments onto the streets. Critics also believe that when zero tolerance policies are strictly applied they can defy common sense, and as evidence point to cases in which students have been expelled for possession of "drugs" such as aspirin, Tylenol, and white out and "weapons" such as paper clips, nail files, and scissors. Furthermore, critics believe that zero tolerance policies conflict with principles of good discipline that require "the punishment to fit the crime" and encourage discipline techniques to serve as learning opportunities for students who break rules. Critics also believe that zero tolerance policies can result in unduly harsh consequences for nonviolent, first-time offenders who are treated equal to seasoned criminals. Finally, while critics concede that student expulsion rates generally decline over the years of a zero tolerance policy, they believe this can at least partly be explained by the increasing number of students disciplined under zero tolerance policies who are placed in alternative educational programs or drop out of school altogether.

On the other hand, advocates of zero tolerance policies assert that they are important tools for sending an unequivocal message to children and youth about the seriousness of certain behaviors. For an orderly learning environment, advocates contend, there must be clear lines between appropriate and inappropriate behavior, and students need to know that crossing that line will bring swift, severe consequences. Advocates of zero tolerance policies believe that making exceptions for first-time offenders or for perpetrators' particular circumstances blurs the lines of discipline for other students and may make schools less safe by returning violent offenders to school. Finally, advocates believe that flexibility in discipline can lead to inadvertent racial and ethnic discrimination. Where zero tolerance policies have resulted at times in unduly harsh punishment, advocates contend the policy was poorly written or poorly administered and should be fine-tuned rather than discarded.

In fact, little research has been done on the effectiveness of zero tolerance policies in curbing unwanted student behavior or the consequences of zero tolerance policies for other community issues such as juvenile delinquency and student dropout rates. As a result, arguments both for and against zero tolerance policies are based more on beliefs and notions about the best way to curb unwanted student behaviors than on facts concerning the efficacy of specific programs and policies.

Issues to Consider

★ **Comprehensive discipline and safety policies.** There are clear differences between student discipline, student punishment, and school security. Discipline progressively helps children learn appropriate behavior and is based on assumptions that all children learn differently (and thus different types of discipline are appropriate for different students). On the other hand, zero tolerance policies are generally punitive and mandate specific punishments for specific behavior, regardless of individual circumstances. Zero tolerance policies are also often justified as a way to ensure the security of other students by removing violent or disruptive students from school. Thus, while zero tolerance policies may be one form of student punishment and may be one component of an overall system of school safety, they cannot effectively supplant many components of a comprehensive system of student discipline. Furthermore, because discipline, punishment, and safety policies may have very different purposes, states may need to consider the extent to which zero tolerance policies help or hinder the implementation of other components of a comprehensive school discipline and safety plan.

★ **Equity.** Zero tolerance policies are more likely to exist in predominantly African-American and Latino districts, and students of color are in general more likely to be suspended or expelled than white students. There is also some evidence that students of color are more likely to be disciplined for minor and subjective acts of misconduct that are often covered under zero tolerance policies, such as "beligerance" or "disturbing the educational process." Because of the likelihood of differential application of discipline to students of color and the prevalence of zero tolerance policies in districts serving students of color, states may want to carefully monitor the effects of zero tolerance policies on students according to race, gender, and type of infraction.

★ **Criminalization of Children and Youth.** Forty-two states require schools to report youth to law enforcement for a variety of infractions, and often reporting is mandatory for students who violate a zero tolerance policy. Where zero tolerance policies are written to include noncriminal behavior, law enforcement may become involved with students in cases of nonviolent, noncriminal behavior.

★ **Focus on Prevention.** While states need to ensure that schools' responses to violence, sexual harassment, and other serious infractions are appropriate, they also need to ensure that student misbehavior is minimized through comprehensive prevention programs. Supporting conflict resolution programs, modeling a healthy concern for justice and fairness, and fostering strong, caring bonds between at-risk youth and trusted adults are a few ways to help prevent violent behavior among youth.

★ **Flexibility.** Effective discipline policies give districts the teeth they need to discipline appropriately and maintain a safe learning environment without imposing unduly harsh and inflexible penalties on students who break rules. Some states and districts have written zero tolerance policies to include a number of penalties and responses covering a range of student misbehavior, while at the same time encouraging local officials to take into account students' home life, prior discipline record, and other circumstances when deciding upon appropriate responses to misbehavior.

★ **Educational options.** Expelling students to the street exacerbates behavior problems and increases the likelihood students will drop out of school. Consequently, states should consider placing expelled students in alternative educational programs that cater to the particular needs of at-risk students. Currently, only about half of all states require that students expelled from school be placed in an alternative educational setting.

State Actions

★ **Colorado** requires districts to provide alternative educational services to expelled students whose parents request them. The state has made over $3 million available to help districts pay for these services.

★ In **Illinois**, the state superintendent has called for statewide public forums on suspensions and expulsions after data demonstrated that the number of expelled students in the state more than doubled from 1990-91 to 1997-98.

★ In **Texas**, the Safe Schools Act of 1995 requires districts to remove violent students from mainstream classrooms and place them in alternative educational settings. Under this law, teachers have the right to remove any student who regularly disrupts their class, and an administrator cannot routinely put a disruptive student back into a class from which they have been removed.

Resources

Annenberg Public Policy Center, *Justice Talking*. A radio debate between John Whitehead of the Rutherford Institute and John Mitchell of the American Federation of Teachers (Annenberg Public Policy Center, www.justicetalking.org, 2000).

The Civil Rights Project, *Opportunities Suspended* (Cambridge, MA: The Civil Rights Project of Harvard University, 2000).

Shanker, Albert, "Zero tolerance: It's No Laughing Matter," in *Where We Stand* (Washington, DC: American Federation of Teachers, 1997).

NASBE
NATIONAL ASSOCIATION OF STATE BOARDS OF EDUCATION

POLICY UPDATES are developed and produced at the National Association of State Boards of Education, 277 South Washington Street, Suite 100, Alexandria, VA 22314, (703) 684-4000. Website: www.nasbe.org. Brenda Welburn, Executive Director; David Kysilko, Director of Publications. All rights reserved.

NSBA/OGC
ZERO TOLERANCE POLICY

Guidelines: Disciplining students for serious offenses

Schools have an obligation to adopt and enforce strong disciplinary policies that create safe schools. Reasonable student discipline policies can help ensure that the overwhelming majority of children who come to school ready and eager to learn are able to do so in a safe, orderly environment. School boards that work with parents and the community to decide what is and is not acceptable behavior, translate these common sense ideas into school policy, and inform all students of that policy, will find that such policies have a positive influence on the behavior of students and the climate of the school. A clear and consistent message that violence and threats of violence will not be tolerated may help to reduce the actual occurrence of violence.

One policy choice for reducing violence in schools is the "zero-tolerance" approach, which during the past several years has caused a great deal of confusion and controversy. The term is used loosely by journalists, the education community, and the public-at-large, and it is often met with strong opposition or support. While most people believe the phrase "zero-tolerance" means the same thing in every school district across the country, quite the opposite is true. Zero-tolerance policies vary significantly from one school district to the next.

The federal government, as well as several state governments, require or allow school districts to enact zero-tolerance policies that prescribe a particular punishment for certain misconduct. For example, the Gun-Free Schools Act of 1994[1] says, "[E]ach State receiving Federal funds under this chapter shall have in effect a State law requiring local educational agencies to expel from school for a period of not less than one year a student who is determined to have brought a weapon to a school under the jurisdiction of local educational agencies in that State, except that such State law shall allow the chief administering officer of such local educational agency to modify such expulsion requirement for a student on a case-by-case basis." 20 USCA § 8921. The term "weapon" means "(A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device." 18 USCA § 921.

---

[1] This statute was enacted under Congress' spending power to prevent students from bringing weapons to school. It is different than the Gun-Free School Zones Act of 1990, which the U.S. Supreme Court struck down in 1995, holding that it exceeded Congress' power under the Commerce Clause of the U.S. Constitution. *U.S. v. Lopez*, 115 S.Ct. 1624 (1995). Congress amended the Gun-Free School Zones Act in 1996, adding a jurisdictional requirement which states, "It shall be unlawful for any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone." 18 U.S.C. § 922(q)(2)(A).

California listed fifteen acts that could potentially lead to suspension or expulsion, including threats to cause physical injury; possessing, selling, using or being under the influence of a controlled substance; causing or attempting to cause damage to school property; and committing or attempting to commit sexual assault. *See* California Education Code Section 48900.

State laws, like the federal law, have discretion built into them. Most state policies allow the superintendent or other school official to lessen the prescribed discipline on a case-by-case basis if circumstances warrant a reduction. For example, Illinois law states, "A student who is determined to have brought a weapon to school, any school-sponsored activity or event, or any activity or event which bears a reasonable relationship to school shall be expelled for a period of not less than one year, except that the expulsion period may be modified by the superintendent, and the superintendent's determination may be modified by the board on a case by case basis." 105 ILCS 5/10-22.6. The result, in the words of school attorney Dean Pickett, is "zero-tolerance for the behavior, but not zero thinking regarding the sanction."

If a local school board decides that a zero-tolerance policy makes sense in its district, it should carefully draft the policy to encourage careful consideration of cases involving alleged student misbehavior. This should include the exercise of sound discretion and adherence to the principles of due process. Any policy must provide adequate procedural due process commensurate with the severity of the designated consequence or discipline for the particular offense. In other words, the extent of the procedures due depends on the nature of the interest being taken away. As such, the school must use fair procedures before taking away a student's property interest in receiving an education. In *Goss v. Lopez*, 419 U.S. 565 (1975), the Supreme Court determined that before a student may be suspended for 10 days or less, the student must be provided a fair and impartial hearing, informed of the charges against him, and given the opportunity to respond. Expulsion procedures depend on state law, but typically, students may be represented by counsel and may call witnesses. The process must also comply with state statutory requirements for student discipline and with special federal and state procedures for disciplining students with disabilities.

The policy should use clear and concise definitions that do not unintentionally include behavior that the school board does not wish to cover. Vague and overly broad policies are more vulnerable to court challenge because they do not adequately inform students of prohibited conduct. Schools should also ensure that the designated consequences are consistent with substantive due process considerations. Basically, the rule and the punishment must be reasonable. Schools must be certain that the punishment does not "shock the conscience." The state's interest in disciplinary situations is to maintain order in the school or to protect students. Therefore, a school district must show that its rules are reasonably related to these purposes to pass the substantive due process test.

School district officials should be consistent in applying the policy and consider mitigating circumstances. If discrepancies in enforcement become apparent, the "get tough" message is nullified and may lead to charges of discrimination. In addition, student discipline policies must be integrated into a comprehensive school safety plan that focuses on a positive school climate and is balanced with prevention, intervention, and common sense enforcement strategies. Discipline policies are an opportunity to teach students about their rights and responsibilities to themselves and others. It is important that all school rules are reasonable and are a part of the learning process.

Schools should not be a haven for misbehavior. They should be places where students learn civic responsibility and where appropriate behavior is expected so that learning can take place. Schools are the safest place for children in America. *See Violence and Discipline Problems in U.S. Public Schools: 1996-1997*, National Center for Education Statistics, 1998. Implementing reasonable student discipline policies with a clear and consistent message that violence and threats of violence will not be tolerated, can help keep them that way.

SAMPLE POLICY:
The following student discipline policy is a sample policy only provided as a reference. If legal advice is required, consult your school district legal counsel.

I. Guidelines for Student Discipline
In order to ensure a safe and secure learning environment, the following offenses will not be tolerated:

A. WEAPONS & DANGEROUS INSTRUMENTS
Students shall not possess, handle, transmit, use or attempt to use any dangerous weapon in school buildings or on school grounds at any time, or in school vehicles and/or buses or off school grounds at a school-sponsored activity, function or event. In accordance with state law, (include citation for state law), the Board of Education shall suspend for 365 days (use the specific words included in the state law, i.e. 365 days, one calendar year, period of not less than twelve consecutive months) any student found to be in violation of this section, unless modified on a case-by-case basis as recommended by the Superintendent (or other individual or group of individuals specified in state law or designated by this policy). Weapons and dangerous instruments as used in this section are defined as:

(1) a firearm – include state or federal definition here;
(2) a powerful explosive (be specific about other things you want to include in the definition of weapon here) – which includes any dynamite cartridge, bomb, grenade, mine, as well as nitroglycerin, trinitrotoluene (TNT) and blasting caps, detonators, and fuses for the explosion thereof;
(3) a knife - which includes any instrument that is capable of ready use as a stabbing weapon that may inflict great bodily injury or death; an instrument with a blade at least 3 inches in length, dagger, dirk, switchblade knife, stiletto, or any other deadly or dangerous weapon of like character;

(4) other dangerous instruments - any other object or instrument capable of being readily used by one person to inflict bodily harm upon another individual with the intention to do so.

REVIEW BY CIRCUIT OF ZERO TOLERANCE CASES

By

D. Patrick Lacy, Jr.
Kelly C. Horan
Reed Smith Hazel & Thomas LLP
Riverfront Plaza, West Tower
901 East Byrd Street, Suite 1700
Richmond, VA 23219
804.344.3400
placy@reedsmith.com
khoran@reedsmith.com

Third Circuit

Lyons v. Penn Hills School District, 723 A.2d 1073 (Pa. Commw. Ct. 1999).

In this case a teacher discovered a student in possession of a Swiss Army knife that he had found in the school hallway. A due process hearing was held in which the hearing examiner determined that the student's knife possession violated the school division's zero tolerance weapons policy and discipline code. The School Board subsequently adopted the hearing officer's decision and expelled the student.

The student appealed this expulsion arguing that it violated his due process rights. The zero tolerance policy in this matter had been adopted, but never reduced to writing. The school division acknowledged this fact, but stated that the school code mandated expulsion in cases regarding weapons violations. The school code, however, also provided that the superintendent could recommend modification of the expulsion provision on a case by case basis. The Commonwealth Court of Pennsylvania found that the unwritten zero tolerance policy violated the student's substantive and procedural due process rights because it did not allow for the discretion of the superintendent, the School Board or the students in modifying the mandatory punishment.

Fourth Circuit

1. Ratner v. Loudoun County Public Schools, 2001 U.S. App. LEXIS 16941 (4th Cir. 2001).

In this case, an eighth grade student took a knife from another student who confessed that she was planning a suicide attempt. The assistant principal learned that the knife was in the plaintiff student's possession and, after notice and a hearing, the school division suspended the student for 10 days for violating the division's zero tolerance weapons policy. Plaintiff instituted an action alleging due process violations under the Fourteenth Amendment, as well as Eighth Amendment violations regarding cruel and unusual punishment. Further, the student sought relief under 42 U.S.C. § 1983, contending that the school division's actions equaled unlawful conspiracy under Virginia law and 42 U.S.C. § 1985, and violations of the Individuals with Disabilities Education Act. The district court dismissed this action for failure to state a claim upon which relief can be granted. See Ratner v. Loudoun County Public Schools, Civ. Action No. 00-944-A (E.D. Va. 2000). In making this decision, the district court noted that

> [a]s alleged, the facts in plaintiff's complaint do not show that these guarantees were violated. Indeed, on October 8th, plaintiff Ratner had an opportunity to present his side of the story on hearing the charges against him to Dean Kellogg, an authority of the school, and took that opportunity, which is clear from the plaintiff's allegation that Dean Kellogg reported her belief that he acted in the best interest of his friend. Although ultimately Ms. Kellogg's recommendation was not accepted by the decision maker and the suspension was imposed, this fact does not bear on whether plaintiff Ratner was given the process due him by school officials.

Id. The Fourth Circuit Court of Appeals affirmed the district court's decision, holding that "[h]owever harsh the results in this case, the federal courts are not properly called upon to judge the wisdom of the zero tolerance policy of the sort alleged to be in place at Blue Ridge Middle School or of its application to Ratner." Ratner at 2001 U.S. App. LEXIS 16941.

The Fourth Circuit Court of Appeals also questioned whether the policy employed in this matter was actually a zero tolerance policy. In footnote 2 of the opinion, the court stated that "Ratner's complaint asserts that the school employs a zero tolerance policy regarding weapons, a policy that precludes officials from considering the circumstances of a particular case when meting out punishment." This seems to provide a helpful definition of what a zero tolerance policy is. The court went on to distinguish the policy at issue in Ratner from a zero tolerance policy, however, as stating that

> although we accept Ratner's assertion as true for the purposes of this appeal, we note that his brief's recitation of the school's policies indicates that possession of a weapon on school grounds would not necessarily result in long term suspension. Instead, as recited by Ratner, board policy in such cases apparently begins with a presumption that offending students would be expelled (permanently removed) but allows school officials discretion to subject offending students 'to such lesser disciplinary action, including long term suspension [suspension for one or two semesters], as may be deemed appropriate.'

Id. This footnote appears to indicate the dichotomy between true zero tolerance policies and alleged zero tolerance policies which in fact allow for some discretion in meting out punishment.

2. M.M. v. Chesapeake City School Board, 52 Va. Cir. 356 (2000).

In this case the student was expelled for multiple threats of violence under the school division's mandatory expulsion zero tolerance policy. The student appealed the expulsion, claiming that the zero tolerance policy was arbitrary and capricious and that it violated his due process rights. In making its determination that the zero tolerance policy was appropriate, the court held that it was "bound to accept that mandatory expulsion, the 'zero-tolerance' policy M. was expelled under, is not arbitrary or capricious. Mandatory sentences for certain criminal offenses is a staple of the laws of the Commonwealth. A school board that adopts mandatory discipline actions based upon certain offenses is likewise not acting in an arbitrary or capricious manner." Id. at 358. Further, with respect to the due process allegations, the court found that no due process violations had occurred because the parents of the student were afforded the opportunity to present arguments to the school division prior to the expulsion. The fact that the School Board rejected those arguments was not significant to the court.

3. Wood v. Henry County Public Schools, 255 Va. 85 (1988).

In this case the student was expelled for bringing a knife on a school field trip. Although the parents were afforded notice and opportunity to present their arguments prior to the student's expulsion, they challenged the legitimacy of the school's policy requiring suspension or expulsion of students who possess knives on school property as violating the student's constitutional or statutory rights. The court found these allegations meritless, stating, in part, that "neither the school division's policies nor the Federal Gun Free School Act with which Code §22.1-277.01(A) complies, divests the school board of its authority to impose a punishment less severe than expulsion." Id. at 92. The court went on to find that no constitutional or statutory rights were violated by this policy. It should be noted that this policy was not referred to as a "zero tolerance policy", but did appear to require mandatory suspension or expulsion.

Fifth Circuit

1. Mitchell v. Board of Trustees, 625 F.2d 660 (1980).

Here, the Oxford School District had a policy prohibiting students from bringing knives or other weapons to school. The punishment for violation of the policy was expulsion. The subject students were caught with knives on school property. They were given hearings and were expelled from school for the duration of the school year. They alleged that their substantive due process rights were violated by the application of appellee's policy that mandated automatic expulsion. The district court entered judgment for Oxford School District. Id. at 661-62.

The type of rule employed by the school decreed consistency in the punishment of certain misbehavior in all pupils. It is a mandatory rule which represents the administration's response to certain articulable and well-defined problems. These rules tell the students that if misbehavior A occurs, punishment B will follow. Id. at 663-64.

The court upheld this rule as consistent with the School Board's obligation to educate the division's children in a safe environment. Id. at 664. There was no constitutional violation in this case because there was a rational relationship between the punishment and the offense. The rule did not impose a grossly disproportionate punishment. See Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir.), cert. denied, 368 U.S. 930 (1961).

The Fifth Circuit noted that school disciplinary matters are best resolved in the local community and within the school system. Therefore, "[i]f the plaintiffs believe that the rule mandating expulsion for bringing weapons to school is too harsh, their remedy is to persuade the School Board to change it." Id.

2. Colvin v. Lowndes County, 114 F. Supp. 2d 504 (N.D. Ms. 2000).

In this case the student was expelled for one calendar year for possessing a Swiss Army knife on school premises. The child had one previous disciplinary infraction on his record. The student sought a preliminary injunction on the grounds that this expulsion violated the Individuals with Disabilities Education Act and his due process rights under the federal Constitution. The court remanded the case to the School Board for reconsideration under an appropriate legal standard. In making its determination the court found that, while the school division may have owed certain evaluative measures to the student under the IDEA, any remedy for this would come into effect once the child was reinstated in school because he was not identified as disabled prior to his expulsion. See id. at 509.

With respect to the notion of due process, the court found that the School Board had employed an erroneous legal standard. In making this holding it stated that "[e]mploying a blanket policy of expulsion, clearly a serious penalty, precludes the use of independent consideration of relevant facts and circumstances. Certainly, an offense may warrant expulsion, but such punishment should only be handed down upon the Board's independent determination that the facts and circumstances meet the requirements for instituting such judgment." Id. at 512. The court did not express disdain for zero tolerance policies, however, but rather found that in this instance the School Board did not independently consider the circumstances surrounding the incident in making its determination. Specifically, the court noted that "[h]ere, the court does not seek to require the School Board to employ a discretionary approach in assessing the punishment for the student, rather that the facts and circumstances of the student's case be given full, independent consideration prior to invoking punishment." Id. at 512 n. 9. The court went on to note that "[n]othing in this court's opinion should be construed to limit the authority of the School Board to enforce its rules and regulations or to enforce its zero-tolerance policy, provided, however, that the correct legal standard is applied and that the student's due process rights are recognized." Id. at 513.

The court also provided a helpful definition of zero tolerance in this case. Specifically, the court noted that "these 'zero-tolerance' policies provide for immediate suspension or expulsion of students that possess weapons or drugs on school grounds. In general, a student found carrying a weapon, such as a gun or a knife, on school property is given no second chance, no appeal, and no guarantees of alternative school programs or education." Id. at 506.

3. Covington County v. G.W., 767 So. 2d 187 (Miss. 2000).

In this case, a student was suspended and subsequently expelled for drinking beer in the school parking lot. Although the principal initially became aware of this through a teacher who had been informed by another student, the subject student admitted to owning the beer that was found in his truck. He did not, however, appear under the influence of alcohol the morning of the incident.

The student was suspended for five days and subsequently expelled pursuant to a zero tolerance policy regarding alcohol possession. The student challenged this expulsion, stating that he was denied substantive and procedural due process under the Fourth and Fourteenth Amendments. With respect to the Fourteenth Amendment allegations, the parents alleged that the school division failed to give proper notice. The court found, however, that any minor technical deviations from the notice procedure were not prejudicial to the parents because the parents appeared at the first formal expulsion hearing and proper notice was given for the second formal expulsion hearing. In making the determination, the court noted that "[t]his school district has imposed a zero tolerance policy, which absent a violation of G.W.'s due process rights, it has the discretion to enforce. We find that no such due process violation occurred." Id. at 192.

With respect to allegations regarding the search of the student's vehicle, the court found that the school division had reasonable suspicion to suspect that G.W. had been drinking in the parking lot on the subject date based on student reports and the empty beer cans found in the back of the student's truck. The court went on to conclude that the search was therefore justified and reasonably related to the allegations that the student had been drinking in the parking lot. Consequently the court found that the Fourth Amendment had not been violated in this matter. Finally the parents allege that the School Board improperly based its decision solely upon hearsay evidence. The court found, however, that any evidence provided by student reports was not relevant to the issue of whether this student possessed alcohol on school property, the charge for which he was expelled. Further, the court held that failure to provide the student with a list of witnesses to be used by the School Board at the hearing was not prejudicial in this matter. Consequently, the court concluded that the student was provided with due process through the hearing procedures that he received.

4. Bundick v. Bay City Independent School District, 140 F. Supp. 2d 735 (S.D. Tx. 2001).

In this case a student was expelled after school officials conducted a routine search of his truck and discovered a machete. The search occurred after a dog alerted school authorities to the student's truck during a routine procedure. The student claimed that his expulsion violated his due process rights and that the search violated his Fourth Amendment rights. He also claimed equal protection violations. The court found that the search of the truck, albeit warrantless and without the student's consent, was justified after a dog trained and certified in "exploratory sniffing" alerted school authorities to the student's truck. The court held that this gave officials reasonable suspicion to search the truck. With respect to the equal protection claim, it appears that the student abandoned that prior to reaching the district court level.

With respect to the claim that the expulsion deprived the student of his substantive and procedural due process rights, the court found that the student was given ample notice and opportunity to present his case at the expulsion hearing. The student attempted to rely on a case from the Sixth Circuit discussed below, Seal v. Morgan, 229 F.3d 567 (6th Cir. 2000) which imposes a scienter requirement for acts punished under zero tolerance policy. The court found that scienter was not a requirement of the subject school district's policy, however, and upheld the policy as rational and not violative of student's substantive due process rights.

Sixth Circuit

1. Seal v. Morgan, 229 F.3d 567 (6th Cir. 2000),

In this case, the student was expelled from high school after school officials found a friend's knife in the glove compartment of his car. Plaintiff denied any knowledge that the knife was in the glove compartment and challenged the School Board's action as arbitrary, irrational and violative of his due process rights. The district court denied the school division's summary judgment motions and entered summary judgment against both defendants on the issue of liability. The zero tolerance policy employed by the School Board in this matter mandated suspension or expulsion of at least one year for possession of a dangerous weapon. It further provided that the superintendent might modify the punishment on a case by case basis. Further, zero tolerance policies were sanctioned by the Tennessee Code.

The court took an interesting position in this case, determining that a zero tolerance policy could not be enforced against a student who did not intentionally commit the acts for which he or she was being punished. In making its decision, the court said that "suspending or expelling a student for weapons possession, even if the student did not knowingly possess any weapon, would not be rationally related to any legitimate state interest." Id. at 575. The court further did not find that the fact that the student had been afforded a number of hearings on the matter was sufficient to constitute due process. In fact, the court stated that "[b]ased on the evidence of record, it appears that nothing that Seal could have said at any of those hearings would have made one bit of difference. Because there was no dispute that the knife was in Seal's car when on school property, the Board insisted that it was required under its Zero Tolerance Policy to expel Seal, whether or not he had any idea that the knife was in the car." Id. at 579.

Seventh Circuit

1. Doe v. Board of Education, 1985 U.S. Dist. LEXIS 15086 (N.D. Ill. 1995).

In this case, a 13 year old learning disabled student was found to be in possession of marijuana and drug paraphernalia at a school dance. He was suspended and subsequently expelled as a result of a zero tolerance policy. The student brought an action against the school division claiming several allegations, including due process violations, IDEA violations and unconstitutional vagueness. In granting summary judgment for the school division, the court held that "[g]enerally, the decision of whether or not to expel a student for gross disobedience or misconduct is best left to the discretion of the School Board. . . . A harsh result does not suggest that due process was lacking or that the procedures followed to reach that result were unlawful." Id.

It should be noted that in making its decision the court considered that the student had argued mitigating circumstances at the expulsion hearing. Specifically, the student stated that he was a special education student with no disciplinary history, no indication of prior drug use and no evidence of use or sale at the subject incident. Further, he argued that he was young and had not fully comprehended the consequences of his behavior. Although the plaintiff student argued that these were all mitigating circumstances, the court found that the fact that the student was given the opportunity to make his case before the hearing officer was significant and indicated that he had been provided with sufficient due process.

2. Jordan v. O'Fallon Township High School Dist. No. 203 Board of Education, 706 N.E.2d 137 (App. Ill. 1999).

In this case, a star high school football player was suspended from playing for the 1998 season as a result of his violation of the school division's zero tolerance conduct code regarding alcohol use. The student asserted that he was denied his due process rights because he was not provided notice and a hearing prior to his suspension from the football team. The court rejected this argument, however, stating that "[s]chool officials can administer discipline for zero-tolerance conduct code violations without formal notice and a hearing." Id. at 143. The court went on to note that the disciplinary process employed by the school division was not arbitrary or capricious because the student was permitted the opportunity to be heard.

Eighth Circuit

1. Anderson v. Milbank School District 25-4, 197 F.R.D. 682 (D. S.D. 2000).

In this case, the student uttered an expletive in the principal's office. The school division had banned use of profane language as part of one of its zero tolerance policies. The student had received a copy of the policy in the beginning of the year and signed an acknowledgment regarding the nature of her violation and her punishment. As a result, the student received two and a half days of in-school suspension and grade reduction for parts of each class missed. The student then challenged this punishment as an unconstitutional limitation on free speech. In granting summary judgment for the school division, the court acknowledged that zero tolerance rules may not always be particularly sensible. Nonetheless, the court ruled that the zero tolerance policy in this case was legitimate. The court noted that "[i]n the absence of a public forum, school officials may limit a student's speech in a school-sponsored activity if the limitation is 'reasonably related to legitimate pedagogical concerns.'" Id. at 687 (citation omitted). The court went on to find that compliance with school rules was a legitimate pedagogical concern in this instance. See id. at 688. Finally, quoting Thomas v. Board of Education, 607 F.2d 1043, 1057 (Newman, Judge, concurring in result) (2d Cir. 1979), the court found that "the First Amendment does not prevent a school's reasonable efforts toward the maintenance of campus standards of civility and decency." Id. at 689.

2. In re Polonia, 1996 Minn. App. LEXIS 150 (Minn. Ct. App. 1996).

In this case, a 13 year old student was suspended and subsequently expelled through the first semester of the school year after he held a fake gun up to another student's head at the bus stop and threatened her. The student was suspended for violating the school division's zero tolerance policy against possession of dangerous weapons. At the expulsion hearing, the school district attorney mentioned that the School Board typically maintained a zero tolerance policy with respect to possession of dangerous weapons. Further, another School Board member indicated that she personally always took a zero tolerance policy on this issue. The student initiated this action, arguing that the zero tolerance position was not explicitly included in the student handbook which contained the regulation.

The court found that the regulations provided the student with sufficient notice of the possibility for expulsion for violating this policy. Consequently, it found that the expulsion was proper in this matter. The student also unsuccessfully challenged some of the hearing officer's findings of fact. Finally, the student alleged various procedural errors occurred which invalidated his expulsion. For example, he stated that the School Board improperly considered evidence of the student's discipline record at the hearing without providing that information to the student previously. The court found that these comments were not prejudicial to the student's substantive due process rights, however, because they were made at the end of the meeting after certain School Board members had already indicated that they would vote in favor of expulsion and because the School Board attorney advised the School Board multiple times during the meeting to consider only the evidence presented at the meeting in making its decisions.

Ninth Circuit

James P. v. Lemahieu, 84 F.Supp.2d 1113 (Haw. 2000).

In this case, the student was suspended for drinking alcohol at his house prior to attending a school function. He was suspended for possession of alcohol. The plaintiff requested injunctive relief, arguing due process violations, as well as equal protection violations. In granting the motion for preliminary injunction insofar as it would rescind disciplinary action, expunge it from the child's records and allow the child to return to participation in extracurricular athletics, the court held that the zero tolerance policy did not provide sufficient notice to students that possession of alcohol would include possession in the body. See id. at 1121. As such, the court found that enforcement of this policy in this case could be viewed as arbitrary. With respect to equal protection claim, the court found no evidence that this policy was discriminatory. It noted that students who possess alcohol while attending school are not a suspect class and that there was no evidence to support classification of the student or other students in some other manner with respect to punishment under the act.

It should be noted that the zero tolerance policy in this matter did not mandate a specific punishment for violation of the policy. Instead, the language of the statute, in pertinent part, stated that "any child who is found to be in possession of a dangerous weapon, switchblade, knife, intoxicating liquor, or illicit drugs while attending school, may be excluded from attending school for up to 92 school days, as determined by the principal and approved by the superintendent or other individuals designated pursuant to rules adopted by the board." Id. at 1116. The court in this matter appeared to consider this policy to be zero tolerance, despite the fact that it clearly allows for discretion in punishments and does not require suspension or expulsion for violation of this rule.

Eleventh Circuit

1. Crawley v. School Board, 721 So. 2d 396 (Fla. Dist. Ct. App. 1998).

In this case, students were expelled from school for possession of an illegal drug in violation of the school division's zero tolerance policy prohibiting students from being on school property while under the influence of drugs. The students appealed the expulsion and the court reversed it, claiming that the school division had not presented any evidentiary proof that the students were "under the influence" of drugs. Id. at 397. In making its determination, the court expressed concern for enforcement of zero tolerance policies by stating "[w]e understand the School Board's concern and the basis for its zero tolerance policy. However, that policy does not override the need for proof of the necessary element of the charged violation as set out in the rule itself." Id.

2. L.P.M. v. School Board, 753 So. 2d 130 (Fla. Dist. Ct. App. 2000).

In this case, students were suspended for 30 days from extracurricular activities for drinking alcohol off campus in violation of the school division's zero tolerance policy. The students challenged the suspension claiming that they had a constitutionally protected interest in extracurricular activities and that school officials could not effectively discipline a student for an off campus activity which did not "materially or substantially interfere with the operation of the school." Id. at 132. The court quickly asserted that no property interest existed in extracurricular activities. Id. The court went on to find that the school division strictly complied with procedures in suspending the student. Specifically, the principal received a written report regarding the violations, interviewed the students, notified their parents and afforded them opportunity for a hearing. Therefore, the court found that the student was "afforded complete due process" and affirmed the suspension. Id. at 133. The court did not address the issue of whether it was appropriate for the school to have a zero tolerance policy forbidding off campus conduct which is unrelated to school functions.

SAMPLE POLICIES ON ZERO TOLERANCE

Drug and Alcohol Use by Students

Date Added: 04/20/2001
Topeka Public Schools - Topeka, KS

NEPN Code: JICH

Type: Policy
Date Adopted: 01/02/1997
Enrollment: 7500-14999
NEPN Codes: JICH
REN Categories: Student Discipline: General
KeyWork Categories: Standards

NARCOTICS OR DRUGS

All public schools in Shawnee County are committed to the education of every student in drug/alcohol abuse awareness and pledge to work cooperatively to achieve zero tolerance of substance abuse in the county. The Topeka Public Schools will actively enforce this policy.

The possession, use, consumption, distribution, sale, or being under the influence of narcotics or drugs (as defined by State Statutes) on public school property or at school activities is prohibited.

Parent or lawful custodian shall be immediately notified of the possible need for medical or professional intervention. School security, and when appropriate, the Police Department shall be notified in the event this policy is violated.

Toward the goal of maintaining a drug-free school environment, while acknowledging that drug and alcohol dependency is an illness that requires treatment and assistance, each attendance center will provide programming in the areas of substance abuse prevention, intervention, and postvention.

Pursuant to Section IX of Policy No. 8125, any student suspended for a substance abuse violation must provide evidence of a consultation with a substance abuse specialist (up to two consultations per suspension with the Shawnee Regional Prevention and Recovery Services, 2209 SW 29 Street, Telephone No. 266-8666, FAX No. 266-3833, will be paid for by the Greater Topeka United Way) before being allowed to return to school.

Policy adopted: June 18, 1980
Revisions: October 19, 1993; August 15, 1996; January 2, 1997
Topeka Public Schools
Topeka, KS
Enrollment: 14,700

Return to Policy List
About NSBA | Federation | Advocacy | Memberships | Meetings | Publications | Resources

Student Conduct

Date Added: 05/09/2001
Kentucky School Boards Association - Frankfort, KY

Type: Policy
Date Adopted: 01/01/2000
Enrollment: state association
NEPN Codes: JIC
REN Categories: Student Discipline: General
KeyWork Categories: Accountability

STUDENTS

Use of Alcohol, Drugs and Other Controlled Substances

DRUGS AND ALCOHOL

The Board is committed to a "zero tolerance" policy concerning the use of alcohol, illegal drugs, and "look-alike" substances. No pupil shall possess, use, be under the influence of, sell, or transfer any of the following on or about school property, at any location of a school-sponsored activity, or en route to or from school or a school-sponsored activity:

1. Alcoholic beverages;
2. Controlled drug substances and drug paraphernalia;
3. Substances that "look like" a controlled substance. In instances involving look-alike substances, there must be evidence of the student's intent to pass off the item as a controlled substance.

In addition, students shall not possess prescription drugs for the purpose of sale or distribution.

DRUGS DEFINED

Controlled substance means any substance or immediate precursor listed in Chapter 218A of the Kentucky Revised Statutes Or any other substance which may be added by the Kentucky Department of Health Services under regulations pursuant to KRS 218A.020.

AUTHORIZED MEDICATION

Use of a drug authorized by and administered in accordance with a prescription from a physician or dentist shall not be considered in violation of this policy.

PENALTY

Violation of this policy shall constitute reason for disciplinary action including suspension or expulsion from school and suspension or dismissal from athletic teams and/or other school-sponsored activities. In addition, when they have reasonable belief that a violation has taken place, Principals shall immediately report to law enforcement officials when an act has occurred on school property or at a school-sponsored function that involves student possession of a controlled substance on school property in violation of the law.

REPORTING

Employees of the District shall promptly make a report to the local police department, sheriff, or Kentucky State Police, by telephone or otherwise, if they know or have reasonable cause to believe that conduct has occurred which constitutes the use, possession, or sale of controlled substances on the school premises or within one thousand (1,000) feet of school premises, on a school bus, or at a school sponsored or sanctioned event.

PREVENTION PROGRAM

The Superintendent shall establish a comprehensive and on-going drug-free/alcohol-free prevention program for all students which shall include notice to students and parents of the following:

1. The dangers of drug/alcohol abuse in the schools;
2. The District's policies and related procedures on drug-free/alcohol-free schools;
3. The requirement for mandatory compliance with the District's established standards of conduct, including those that prohibit use of alcohol, drugs and other controlled substances;
4. Information about available drug/alcohol counseling programs and available rehabilitation/student assistance programs; and
5. Penalties that may be imposed upon students for drug/alcohol abuse violations.

REFERENCES:

OAG 82-633
KRS 160.290; KRS 161.180
KRS 218A
KRS 158.150
KRS 158.154
KRS 158.155
Clark County Board of Education vs. Jones, KY. App., 625 S. W. 2d 586 (1981).
Improving America's Schools Act of 1994 (IASA), Title IV: Safe and Drug-Free Schools and Communities
OAG 93-32

Student Discipline

Date Added: 04/19/2001
Michigan Association of School Boards - Lansing, MI

Type: Policy
Date Adopted: 01/01/2000
Enrollment: state association
NEPN Codes: JK
REN Categories: Student Discipline: General
KeyWork Categories: Accountability

NEPN Code: JK
Terroristic Threats/Acts

The Board recognizes the danger that terroristic threats or acts by students present to the safety and welfare of District students, staff and community. The Board acknowledges the need for an immediate and effective response to a situation involving such a threat or act.

A terroristic threat shall mean a threat to commit violence communicated with the intent to terrorize another, to cause evacuation of a building, or to cause serious public inconvenience, in reckless disregard of the risk causing such terror or inconvenience.

A terroristic act shall mean an offense against property or involving danger to another person.

The Board prohibits any District student, at any time, regardless of whether school is in session, from communicating terroristic threats or committing terroristic acts directed at any student, employee, Board member, community member, school building or property. Any such threat, either real or intended as a joke, or any terroristic act will not be tolerated in or around the school, its properties or in or on any vehicle or watercraft owned, leased, rented or used in connection with any school activity and hereby adopts a "zero tolerance" of any such actions.

The Board directs the Superintendent to react promptly and appropriately to information and knowledge concerning a possible or actual terroristic threat or act and to initiate or recommend the most serious disciplinary action available under the law for such threats or acts.

8255 Terroristic Threats/Acts 8255-2

Staff members and students shall be responsible for informing the Superintendent regarding any information or knowledge they may have relevant to a possible or actual threat or act. Failure to bring forward information or knowledge relative to a possible or actual threat or act shall result in disciplinary consequences for students up to and including permanent expulsion and for staff members up to and including discharge.

When the Superintendent has evidence that a student has made a terroristic threat or committed a terroristic act, the following guidelines shall be applied:

1. The Superintendent shall immediately suspend the student.
2. The Superintendent shall promptly report the incident to the Board President.
3. Based upon further investigation, the Superintendent will determine whether the student shall be reported to law enforcement officials.

The Superintendent, based upon further investigation, shall recommend expulsion, if appropriate, of the student to the Board.

If a student is expelled for making terroristic threats or committing terroristic acts, the Board may require, prior to readmission, that the student provide competent and credible evidence that the student does not pose a risk of harm to others.

Approved:

01/01/00

Michigan Association of School Boards

Return to Policy List
About NSBA | Federation | Advocacy | Memberships | Meetings | Publications | Resources

SAMPLE POLICY:

The following student discipline policy is a sample policy only provided as a reference. If legal advice is required, consult your school district legal counsel.

I. Guidelines for Student Discipline

In order to ensure a safe and secure learning environment, the following offenses will not be tolerated:

A. WEAPONS & DANGEROUS INSTRUMENTS

Students shall not possess, handle, transmit, use or attempt to use any dangerous weapon in school buildings or on school grounds at any time, or in school vehicles and/or buses or off school grounds at a school-sponsored activity, function or event. In accordance with state law, (include citation for state law), the Board of Education shall suspend for 365 days (use the specific words included in the state law, i.e. 365 days, one calendar year, period of not less than twelve consecutive months) any student found to be in violation of this section, unless modified on a case-by-case basis as recommended by the Superintendent (or other individual or group of individuals specified in state law or designated by this policy). Weapons and dangerous instruments as used in this section are defined as:

(1) a firearm – include state or federal definition here;
(2) a powerful explosive (be specific about other things you want to include in the definition of weapon here) – which includes any dynamite cartridge, bomb, grenade, mine, as well as nitroglycerin, trinitrotoluene (TNT) and blasting caps, detonators, and fuses for the explosion thereof;
(3) a knife - which includes any instrument that is capable of ready use as a stabbing weapon that may inflict great bodily injury or death; an instrument with a blade at least 3 inches in length, dagger, dirk, switchblade knife, stiletto, or any other deadly or dangerous weapon of like character;
(4) other dangerous instruments - any other object or instrument capable of being readily used by one person to inflict bodily harm upon another individual with the intention to do so.

Weapons in School

Date Added: 07/03/2001
Hopkins School District 270 - Hopkins, MN

NEPN Code: JICI

Type: Policy
Date Adopted: 06/21/2001
Enrollment: 7500-14999
NEPN Codes: JICI
REN Categories: Trends & Issues: School Violence
KeyWork Categories: Accountability

WEAPONS POLICY - DISTRICT-WIDE

POLICY

It is the policy of the School District to maintain a positive, safe, secure learning and working environment. In striving to attain such an environment, the District takes the position of no tolerance for weapons in our schools or in any other school sponsored activity. All weapons or instruments that have the appearance of a weapon or may be used as a weapon are prohibited within all school environments, and at any school sponsored activity except for educational purposes as authorized in advance by the building principal or designee, or as provided by Minnesota Statute governing licensed peace officers.

Students and non-students, including adults and visiting youths, are forbidden to possess a weapon in school, on school grounds, at school activities, at bus stops, on school buses or school vehicles, or entering upo ¢n or departing from school premises, property, or events. This prohibition applies to all school owned, leased or controlled buildings and grounds, all school owned, leased, or contracted vehicles and applies at any school sponsored event. This prohibition also applies to any vehicle brought to school grounds or school related events.

DEFINITIONS

Weapon is defined as any object, device or instrument designed as a weapon or through its use is capable of threatening or producing bodily harm or which may be used to inflict harm or injury including but not limited to:

1. All firearms, whether loaded or unloaded;
2. Other guns of all types including pellet, B-B, stun, look-alike, and non-functioning guns that could be used to threaten others;
3. Knives, switch blades or automatically opening blades, daggers, swords, razors;
4. Artificial knuckles or other objects designed to be worn over the fist or knuckles;
5. Blackjacks, clubs, numchucks, throwing stars;
6. Explosives, incendiary devices;
7. Poisons, chemicals, or substances capable of causing bodily harm;
8. Bow and arrows, sling shots;
9. Laser Pointers
10. Any other device or instrument that is used or may be used to intimidate, threaten or inflict harm or injury.
11. Mace may be considered a weapon under this Policy. If the students parents make special arrangements with the building principal for the student to check the mace into the school office upon arrival and to check the mace out of the school office upon leaving for the day, students may be allowed to carry mace under limited circumstances. Employees may make similar arrangements with the building principal or supervisor.

Possession means having a weapon on one's person or in an area in one's control and includes the handling, transmission and use or threat of use of a weapon. If a student discovers that he or she has accidentally brought a weapon to school and immediately takes the weapon to the principal's office, the student shall not be considered in possession of a weapon. If a student realizes that he or she has brought a weapon to school that is in a vehicle on school grounds, and the student informs the principal or a staff person immediately, the student will not be considered to be in possession of a weapon. If a student finds a weapon on school grounds, the student shall inform the principal or other staff person immediately and will not be deemed to be in possession of a weapon.

Zero tolerance means the District strictly prohibits weapons on school grounds and will take immediate disciplinary action with respect to those who violate this Policy. The District takes a position of zero tolerance on the possession, handling, transmittal, storage, or use of any weapon or object that may be used as a weapon on school grounds or at school related events.

Consequences for Violation of this Policy by Students

A. Firearm Possession

A student who possesses a firearm as defined by federal law will be recommended for expulsion for at least one year pursuant to Minnesota statute. Pursuant to Minnesota law, the school board may modify this requirement of expulsion on a case by case basis.

B. Possession of Other Weapons

The following consequences may be invoked at the discretion of the principal including but not limited to:

1. Confiscation of the weapon,
2. Notification and involvement of Police or Police Liaison,
3. Notification of Parents/Guardian,
4. Suspension, expulsion, exclusion of student, pursuant to the Pupil Fair Dismissal Act and federal and state statutes applicable to disabled students,
5. Dismissal of student from a specific class or classes,
6. Or other actions as determined appropriate by the principal and approved by superintendent or designee

Violation by Other Youths and Adults Including Employees

The following consequences may be invoked at the discretion of the District including but not limited to:

1. Immediate police involvement,
2. Employees may also be subject to District investigation and application of relevant District policies and disciplinary procedures,
3. Any further action appropriate to protect the safety of students, staff, others and District property.

Authorized Instructional and Work Related Equipment and Tools

While this Policy represents a zero tolerance position on weapons and/or look-alike weapons, it is not meant to interfere with instruction or use of appropriate equipment and tools by employees and students. Such equipment when properly used and stored shall not be considered a weapon for purposes of this Policy. However, when authorized instructional and work equipment and tools are used in potentially dangerous or threatening manner, the guidelines and consequences of this Policy will take effect.

Revised: June 21, 2001
Revised: June 17, 1999
Adopted: May 6, 1993

Hopkins School District 270
Hopkins, MN

Enrollment: 8,100

Return to Policy List
About NSBA | Federation | Advocacy | Memberships | Meetings | Publications | Resources

ADDITIONAL

RESOURCES

To access links to the studies below, go to the
Center for the Prevention of School Violence
http://www.ncsu.edu/cpsv/Acrobatfiles/Links2001.pdf
and click on

LINKS 2001
SELECTED SCHOOL VIOLENCE RESEARCH LINKS

- **Annual Report on School Safety October 2000**
http://www.ed.gov/offices/OESE/SDFS/annrept00.pdf

A collaborative effort between the Department of Education and the Justice Department produced this study on school safety. This study describes the efforts made over the previous year to make schools safer.

Questions addressed in this study include:

What is the nature and scope of school violence?
What can communities do through collaboration?
What are some model programs dealing with school safety?
Where can one find resources on school safety?
The 1998 and 1999 versions are also available.

- **Indicators of School Crime and Safety, 2000**
http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2001017

This report presents data on crime at school from the perspectives of students, teachers, principals, and the general population from an array of sources.

Questions addressed in this study include:

What type of crime is occurring at school?
When are crimes committed at school?
How prevalent is school crime?
Where does school crime take place?
How comparable is school crime to crime in society?
The 1998 and 1999 versions of this report are available.

- **Report on State Implementation of the Gun-Free Schools Act -School Year 1998-1999**
http://www.ed.gov/offices/OESE/SDFS/GFSA/

The number of firearms found on school campuses and the punishment the possessors received are described.

Questions addressed in this study include:

How many students were expelled for possessing a firearm (by type of firearm and school level)?
How many expulsions were modified on a case-by-case basis?
How many expulsion cases were not modified for students with disabilities?
How many expelled students were referred to an alternative school or program?
The 1996-1997 and 1997-1998 versions of this report are available and the law enacting the report is available

- **School-based Surveillance of Violence, Injury, and Disciplinary Actions**
http://www.hamfish.org/pub/incdrept1.pdf

This report examines how data from student self-report surveys and other sources can be used to assess the weaknesses in current school incident reporting systems and improve the validity of surveillance data on school violence. Particular attention is paid to assessing the validity of data from Gun-Free Schools Act (GFSA) reports on the number of guns in schools in light of nationally representative student survey data and data from state-level student surveys.

Questions addressed in this study include:

How accurate are school violence incident reporting systems?
How many guns are reportedly brought on to school campuses each year?
How many students bring guns to school each year?

- **Initiation Rites in American High Schools: A National Survey**
http://www.alfred.edu/news/html/hazing_study.html

This report focuses on hazing in high schools and its effects on group and student behavior. In the past hazing has been thought to be solely a college problem, but this report shows that hazing begins long before college.

Questions addressed in this study include:

How prevalent is hazing among American high school students?
How does hazing affect students?
At what age does hazing begin?

- **Youth Gangs in Schools**
http://www.ncjrs.org/pdffiles1/ojjdp/183015.pdf

This report seeks to give the reader an understanding about gang presence in schools and the effects of having such a presence.

Questions addressed in this study include:

What are the characteristics of gangs in schools?
What are the reasons for greater gang prevalence in schools?
What is the impact of gangs on victimization at school?

- **The National Study of Delinquency Prevention in Schools**
http://www.gottfredson.com/national.htm

This report is a large-scale study of problem behavior and of what schools do to prevent or reduce problem behavior and promote safe and orderly environments.

Questions addressed in this study include:

What is the nature of problem behavior in schools?
What activities are available to create and maintain safe and orderly schools?
How intense do delinquency programs have to be, and what are some best practices?
What are some predictors of quality of program implementation?
What are the school-level correlates of implementation quality?

- **Order in the Classroom Violence, Discipline, and Student Achievement**
  http://www.ets.org/

  This report shows the correlation between student achievement and school discipline.

  Questions addressed in this study include:

  What are the links among school discipline, delinquency, and achievement?
  What are the trends in school disorders?
  What are some of the recent developments in policy and practice?

- **The Metropolitan Life Survey of the American Teacher 1999: Violence in America's Public Schools - Five Years Later**
  http://www.metlife.com/Companyinfo/Community/Found/Docs/99pdf.html

  Opinions and experiences of students, teachers, and law enforcement officials are presented.

  Questions addressed in this study include:

  What are the overall trends in school violence?
  What are the causes of school violence?
  Is school violence an urban problem?
  Is school violence a high school problem?
  Is school violence related to gender?

  The information presented in this study is presented as a follow up to Met Life's 1993 study.

- **Violence and Discipline Problems in U.S. Public Schools: 1996 -1997**
  http://nces.ed.gov/pubs98/violence/index.html

  `The first comprehensive study done by the Department of Education on the topic of school violence. The school violence survey was conducted with a nationally representative sample of 1,234 regular public elementary, middle, and secondary schools in the 50 states and the District of Columbia in the spring and summer of 1997.

  Questions addressed in this study include:

  How serious a problem are crime and violence in U.S. public schools in the 1996-1997 school year?
  What types of schools were likely to have more serious problems with crime and violence?
  What measures are schools taking to deal with problems of crime and violence?

- **Students' Reports of School Crime: 1989 and 1995**
  http://nces.ed.gov/pubs98/crime/index.html

  Students give their impressions of the crimes that exist in schools and how often they occur.

  Questions addressed in this study include:

  What is student victimization, and how often does it occur?
  How available are drugs on school campuses?
  How common are street gangs at school?
  How often are guns brought to school?

- **The Fifth Phi Delta Kappa Poll Of Teachers' Attitudes Toward The Public Schools**
http://pdkintl.org/kappan/klan9904.htm

This survey seeks to find out what teachers think of the public education system in America. It is a comprehensive look at the education system covering topics such as safety, climate, and discipline.

Questions addressed in this study include:

Do teachers' opinions differ from that of the general public on how our schools are advancing?
What are teachers' biggest concerns for the future of education?
How big of a problem do teachers see school violence being and becoming?
The four previous surveys are also available.

- **Juvenile Offenders and Victims: 1999 National Report**
http://www.ncjrs.org/html/ojjdp/nationalreport99/index.html

This is the fourth report in this series, and it provides information on the following topics: juvenile crime, violence, victimization, and the juvenile justice system.

Questions addressed in this study include:

What characteristics are present in today's juvenile population?
How many juveniles become victims each year?
How many juveniles become offenders each year?
What does the juvenile justice system look like in America?
How many juveniles are in jail today?

THE 2000-2001 TERM
OF THE
UNITED STATES SUPREME COURT
AND ITS
IMPACT ON PUBLIC SCHOOLS

John W. Borkowski
Alexander E. Dreier
Maya R. Kobersy

Hogan & Hartson L.L.P.
555 13th Street, N.W.
Washington, D.C. 20004
(202) 637-5600

August 2001

TABLE OF CONTENTS

Page

INTRODUCTION 1

I. SEPARATION OF CHURCH AND STATE 3

II. VOTING RIGHTS 7

- A. *Bush* v. *Gore* 7
- B. Other Voting Rights Cases 10

III. TITLE VI 13

IV. SEXUAL HARASSMENT AND GENDER DISCRIMINATION 15

- A. Sexual Harassment 16
- B. Gender Discrimatinion 19

V. STATE ACTION 20

VI. FEDERALISM 22

VII. AMERICANS WITH DISABILITIES ACT 26

VIII. FREEDOM OF SPEECH 30

IX. FOURTH AMENDMENT 35

X. LABOR AND EMPLOYMENT 36

XI. PUNITIVE DAMAGES 41

XII. RACE-CONSCIOUS DECISIONMAKING 43

XIII. A PREVIEW OF THE 2001-2002 TERM 45

- A. Race-Conscious Decisionmaking 45
- B. FERPA 47
- C. Americans with Disabilities Act 47
- D. Federalism 49
- E. Vouchers 50
- F. Title VII 51
- G. Special Education 52

THE 2000-2001 TERM OF THE UNITED STATES SUPREME COURT AND ITS IMPACT ON PUBLIC SCHOOLS[1]

INTRODUCTION

The 2000-2001 Term of the United States Supreme Court is likely to be best remembered for the Court's dramatic intervention in the 2000 presidential election, halting the manual recount of votes in Florida. This Term, however, also produced many rulings that address legal issues of more direct significance to public school systems. Perhaps the most important of these was the Court's decision in *Good News Club v. Milford Central School*, which requires public school districts to allow sectarian and proselytizing religious groups to use school facilities on the same terms as other groups.

Several of the Court's other rulings also will significantly affect public school districts and their students. For example, in *Alexander v. Sandoval,* the Court, disagreeing with several lower federal courts, held that there is no private right of action under the disparate impact regulations adopted pursuant to Title VI of the Civil Rights Act of 1964. In *Hunt v. Cromartie*, the Court revisited for a third time proposed North Carolina election district boundaries and clarified previous electoral redistricting rulings. The Court also decided several other important cases, elucidating sexual harassment standards; finding that state athletic associations may be "state actors" subject to constitutional requirements; and continuing to redefine the constitutional boundaries between federal and state authority.

---

[1] Hogan & Hartson L.L.P. has published an annual review of the Supreme Court's actions affecting public education since 1987.

In addition to summarizing the Court's significant decisions, this review also describes a number of cases significant to public schools that the Court declined to consider in the 2000-2001 Term. When the Supreme Court decides not to review a case, known as a denial of *certiorari*, it means only that the lower court's ruling will stand; the denial does not necessarily signify that the Supreme Court agrees with the lower court's reasoning or conclusion. The Supreme Court has essentially unlimited discretion to decide which cases it wishes to consider. Normally, the Court does not explain its reasons for declining to review a case. During the 2000-2001 Term, the Supreme Court decided only 79 cases, and denied review of literally thousands.

This Term the Court declined to review several high-profile lower court decisions involving education, including a Ninth Circuit ruling allowing the consideration of race in university admissions to promote the educational benefits of diverse student enrollments, and a conflicting Fifth Circuit ruling prohibiting similar practices. The Court also declined to review more than 20 special education cases.

This summary also briefly addresses several cases that the Supreme Court is expected to decide during the 2001-2002 Term, which officially begins in October 2001. To date, notable cases the Court has decided to review include an affirmative action case and an appeal involving whether peer-grading practices violate student privacy under the Family Educational Rights and Privacy Act

("FERPA"). The Court also has been asked by proponents of Cleveland's private school voucher program, including the Bush administration, to review the Sixth Circuit's decision finding the program unconstitutional. As of this writing, the Court had not acted on that request.

For the sixth consecutive year, the 2000-2001 Term produced no changes in the composition of the Court. Because of concerns about the age or health of several Justices and the election of a new President, it is widely speculated that during the next few years, one or more new appointments to the High Court will be made. Because the Court is sharply divided on a number of issues, with nearly a third of its cases decided by five-to-four votes, any changes on the Court could have important implications for public school districts.

This review of the Supreme Court's 2000-2001 Term is divided into sections by subject matter, as follows: (1) Separation of Church and State; (2) Voting Rights; (3) Title VI; (4) Sexual Harassment and Gender Discrimination; (5) State Action; (6) Federalism; (7) Americans with Disabilities Act; (8) Freedom of Speech; (9) Fourth Amendment; (10) Labor and Employment; (11) Punitive Damages; (12) Race-Conscious Decisionmaking; and (13) A Preview of the 2001-2002 Term. Full citations to the cases and statutes discussed appear in the appendix at the end of this summary.

I. SEPARATION OF CHURCH AND STATE

This Term, the Supreme Court again reviewed the contours of the First Amendment separation between Church and State in the public school context. In

Good News Club v. Milford Central School, the Court held that a school district that permits public use of its facilities may not exclude community organizations based on their religious viewpoint.

The case involved a policy of Milford (New York) Central School that allowed community members to use school facilities for activities "pertaining to the welfare of the community" but barred use "for religious purposes." When the Good News Club, a Christian children's group, was denied use of the facilities for its weekly after-school meetings, the club filed suit, alleging a violation of the group's First Amendment rights.

Justice Thomas, writing for a six-Justice majority, found the denial of the club's application to be an unconstitutional restriction on the freedom of speech. Although a school district that operates a "limited public forum" may lawfully restrict the *subject matter* of speech permitted on its property, it may not regulate or impose unreasonable restrictions on speech based on *viewpoint*. The Court acknowledged that when speech is "religious in nature," the distinction between permissible content limitations and impermissible viewpoint discrimination is often difficult to draw, but found that the school's refusal to allow the club to use its premises constituted discrimination based on the club's viewpoint. Because the policy would permit other organizations, such as the Boy Scouts, to use school facilities to teach morals and character development, the school could not bar the Good News Club from using the facilities to undertake the same kinds of activities from a religious perspective.

The Court also held that the school had no valid Establishment Clause interest in excluding the club. According to the majority, accommodating the group would not be viewed as an endorsement of religion because "the club's meetings were held after school hours, not sponsored by the school, and open to any student who obtained parental consent, not just club members." Instead, the Court noted the countervailing danger that students "would perceive a hostility toward the religious viewpoint if the club were excluded."

Justice Souter, in dissent, criticized the majority opinion for downplaying the Good News Club's proselytizing nature and for characterizing its activities as simply "the teaching of morals and character, from a religious standpoint." Because the club intended to hold "an evangelical service of worship calling children to commit themselves in an act of Christian conversion," the dissent would have held the club's activity to be beyond the scope of the school's limited forum, and would therefore have found that it could constitutionally be excluded.

The Court's decision in *Good News Club* means that school district community use policies should not exclude religious groups, if the policies permit other groups to use school facilities for activities focused on moral and character development. In light of the avowedly religious purpose and activities of the Good News Club, the majority opinion suggests there may be no religious use of school facilities by an outside group that would be held to violate the Establishment Clause. Nevertheless, school districts that do not wish to have their facilities used for religious purposes may opt not to establish a "limited public forum." This course of action would require much greater limitations on the use of schools by outside groups than many school districts currently have in place.

After its decision in *Good News Club*, the Supreme Court remanded a similar case to a lower court for reconsideration. In *Campbell v. St. Tammany Parish School Board*, the Supreme Court ordered the Fifth Circuit to reconsider a ruling that upheld a school district's refusal to rent its facility to the Christian Coalition.

In a case involving somewhat similar conflicts between First Amendment free speech and Establishment Clause concerns, the High Court declined to review *C.H. ex rel. Z.H. v. Oliva*. In *Oliva*, a public school teacher denied a first-grader permission to read aloud a Bible story to classmates, but permitted other children to read their favorite stories aloud. A divided *en banc* Third Circuit remanded the case on procedural grounds, finding the plaintiff's allegations insufficient to suggest that the named defendants had personally participated in or approved of the challenged conduct.

In the wake of last Term's decision in *Sante Fe Independent School District v. Doe*, which limited student prayer at school-sponsored events, the Supreme Court declined to review similar cases presented to it during this Term. For example, the Court denied certiorari in *Cole v. Oroville Union High School District*, in which the Ninth Circuit upheld the dismissal of claims brought by two students who were prohibited from giving a sectarian, proselytizing invocation at their high school graduation. The court of appeals rejected the students' free exercise claims on the ground that the school's actions were necessary to avoid violating the Establishment Clause as interpreted by the Supreme Court in *Sante Fe*.

On the other hand, the Court left intact the Eleventh Circuit's ruling in *Chandler v. Siegleman*. In *Chandler* – and also in *Adler v. Duval County School Board*, which the Court also had vacated and remanded after *Santa Fe* – the Eleventh Circuit interpreted *Sante Fe* narrowly and upheld policies allowing student-initiated prayer at school-sponsored events. The court of appeals emphasized that public schools must avoid "censorship" of student-initiated prayer at school events as well as "sponsorship" of prayer.

In the context of school-sponsored events, the Eleventh Circuit's approach appears to leave an unclear boundary between required accommodation of religion, on one hand, and the impermissible establishment of religion found by the Supreme Court in *Sante Fe*, on the other. The Eleventh Circuit's decisions in *Chandler* and *Adler* are also in tension with the Ninth Circuit's recent decision discussed above. Given the absence of clear lines in this area, and the tradition of student prayer at certain school-sponsored events in many school districts, the Supreme Court may soon be called upon to clarify the governing standards.

II. VOTING RIGHTS

A. *Bush* v. *Gore*

In *Bush v. Gore*, one of the most remarkable and widely discussed Supreme Court decisions in decades, the Supreme Court ruled that the manual recount of presidential ballots ordered by the Florida Supreme Court violated the Equal Protection Clause of the Fourteenth Amendment because the Florida court had not provided a uniform standard for discerning voter intent. The Supreme Court did not remand for imposition of a uniform standard, but instead halted the recount, assuring George W. Bush a victory in the electoral college.

In the per curiam opinion, a five-to-four majority (Chief Justice Rehnquist and Justices Kennedy, O'Connor, Scalia, and Thomas) found that the recount mechanisms, implemented in response to the Florida Supreme Court decision ordering a manual recount, did not satisfy the minimum federal constitutional requirement of non-arbitrary treatment of voters. For example, the majority reasoned, the standards for accepting or rejecting contested ballots might vary not only from county to county, but even within a single county from one recount team to another. Thus, the Court concluded that "the recount cannot be conducted in compliance with the requirements of equal protection and due process without substantial additional work. It would require not only the adoption (after opportunity for argument) of adequate statewide standards for determining what is a legal vote, and practicable procedures to implement them, but also orderly judicial review of any disputed matters that might arise." The majority concluded that time did not permit the Florida Supreme Court to develop and implement such procedures.

The four dissenting members (Justices Breyer, Ginsburg, Souter, and Stevens) presented two principal objections. First, they found no appropriate basis for federal judicial intervention in the case, which involved a state court's interpretation of state election laws. Second, according to the dissenters, if there were a real federal equal protection or due process concern, the proper course would have been to return the case to the Florida Supreme Court to allow it to specify procedures for constitutionally implementing the standards of the Florida statutes.

Under ordinary circumstances, a decision such as the one in *Bush* v. *Gore* would establish a new precedent for federal court constitutional challenges to allegedly arbitrary state voting requirements. However, the majority deliberately sought to narrow the ruling's prospective application by limiting it "to the present circumstances," because "the problem of equal protection in election processes generally presents many complexities." Thus, it is unlikely, though still possible, that *Bush v. Gore* will affect future election issues involving public school districts.

The far larger significance of the Court's decision for public school districts will undoubtedly come from the decision's impact on the outcome of the 2000 presidential election. President Bush has proposed and received bipartisan support for an education reform agenda based on annual testing, new accountability measures, parental choice when public schools fail, and more state flexibility in allocating federal education funding. If enacted, these policies, and particularly a proposal for annual testing in the third through eighth grades, would have a significant impact on public school districts.

B. Other Voting Rights Cases

The Supreme Court this Term decided three other important voting rights cases that may affect public school districts. In those cases the Court: clarified the constitutional standard for election districts allegedly drawn based on race; made clear that only persons residing in such election districts have standing to challenge them on equal protection grounds; and summarily affirmed a lower court decision postponing evaluation of the constitutionality of statistically adjusted census counts.

In *Hunt v. Cromartie,* the Court upheld the constitutionality of the redrawn 12th Congressional District of North Carolina, prior versions of which had been struck down in *Shaw v. Reno (Shaw I)* (1993) and *Shaw v. Hunt (Shaw II)* (1996). In *Shaw I* and *Shaw II*, the Court had found that the district's lines were drawn with an impermissible focus on race. In this Term's 5-4 decision, the Court reaffirmed that an election district may violate *Shaw I* only if race is the "predominant factor" in creating the district. The Court found that the North Carolina legislature's stated purpose in drawing the revised district lines – to maintain a safely Democratic district – was a legitimate one and that race was not the predominant factor. The Court held that evidence of the large number of African Americans in the district did not prove that race, rather than politics, was the dominant factor in drawing district lines, citing statistical evidence that black voters reliably voted for Democratic candidates. That race and voting behavior were highly correlated, the Court held, did not invalidate the legislature's legitimate political motivation.

Under the Court's decision in *Hunt v. Cromartie*, school districts may draw election districts based on voting behavior or party affiliation, even if such characteristics correlate strongly with race, if the intended effect is political. However, as this decade's redistricting cycle continues, school districts engaged in redistricting should continue to be cautious of the federal courts' skepticism of unusually shaped districts that appear to have been drawn based on racial considerations, such as increasing minority voting strength. On the other hand, under the Voting Rights Act, school districts also may not act in a way that dilutes minority voting strength.

The Court also decided two companion cases brought by white voters in districts adjacent to "majority minority" districts. The white voters claimed that racial motivation in drawing the neighboring districts violated their equal protection rights. In a *per curiam* decision in *Sinkfield v. Kelley* and *Bennett v. Kelley*, the Court held that the plaintiffs lacked standing to challenge the legislature's districting scheme because they were not personally denied equal treatment. This decision effectively limits the class of persons who may sue to enjoin an allegedly racially gerrymandered district to residents of that district.

In *Virginia v. Reno*, the Supreme Court summarily affirmed the decision of a special three-judge panel of the United States District Court for the District of Columbia holding that the Commonwealth of Virginia could not yet challenge the constitutionality of statistically adjusted Census figures. The case was not appropriate for review because it remained uncertain whether the United States Census Bureau ultimately would use or even release the adjusted figures. The outcome of these battles over the Census may well affect school districts, because adjusted Census figures could potentially affect both the allocation of federal funding, including education funds, and some state or local election redistricting.

The Supreme Court denied *certiorari* in several voting rights cases, leaving lower court rulings undisturbed:

- In *Rural West Tennessee African-American Affairs Council v. Sundquist*, the Sixth Circuit concluded that a Tennessee legislative districting plan violated Section 2 of the Voting Rights Act because of vote dilution within a particular area of the state, and rejected a defense arguing that the number of black members of the entire Tennessee House was roughly proportional to the black voting age population of the state.

- In *Chen v. City of Houston*, the Fifth Circuit agreed with the Fourth Circuit, and disagreed with the Ninth Circuit, in holding that the question whether to base districting on total population or on the population of eligible voters was best left to the discretion of state legislatures.

- In *Harper v. City of Chicago Heights* and *McCoy v. Chicago Heights*, the Seventh Circuit upheld a hybrid election system – in which the six general members were elected from districts, and the head of the body was elected at large – that had been developed to remedy Voting Rights Act violations by the Parks Commission of Chicago Heights. The court rejected that same system, however, as a remedy for past violations in the election of the City Council and mayor.

III. TITLE VI

During its 2000-2001 Term, the Supreme Court decided an important case involving Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, or national origin by recipients of federal funds, including public schools. In *Alexander v. Sandoval*, the Court held, five-to-four, that individuals have no private right of action to enforce disparate impact regulations promulgated by federal agencies charged with enforcing Title VI. Individuals now may bring suit directly under Title VI only when they allege *intentional* discrimination.

The *Sandoval* plaintiff alleged that the State of Alabama's policy of administering driver's license examinations only in English discriminated on the basis of national origin. She based her claim on a U.S. Department of Justice regulation, promulgated under Title VI, that prohibits recipients of federal funding from using criteria or administrative methods that have a discriminatory effect on racial or national origin groups. The Supreme Court rejected her claim, holding that Title VI does not authorize private lawsuits to enforce the Justice Department "disparate impact" regulations or similar Title VI regulations issued by other agencies.

Writing for the majority, Justice Scalia distinguished Section 601 of Title VI, which prohibits only intentional discrimination, from Section 602, under which agencies have promulgated regulations prohibiting practices that have a disparate impact on racial or national origin groups. Although the Court assumed without deciding that those regulations are valid, it refused to recognize a private right of action to enforce the agencies' disparate impact regulations. The majority reasoned that those regulations do not implement Section 601, but extend beyond it by prohibiting activities that Section 601 otherwise would allow. The Court emphasized that the creation of a private right of action is the proper role of Congress, not the courts.

To ascertain Congress's intent, the majority looked exclusively to the text and structure of Title VI. The Court noted that Section 602, unlike Section 601, contains no "rights-creating" language. According to the Court, Section 602 focuses not on individual rights, but on regulatory agencies, giving them authority to enforce Section 601 rights. Section 602 also spells out the procedures by which agencies can enforce their regulations, including by cutting off federal funding. According to the Court, these textual clues implied that Congress intended to leave enforcement of Section 602 regulations to governmental agencies, and to allow private individuals to challenge only intentional discrimination under Section 601.

In dissent, Justice Stevens criticized the Court's decision as "unfounded in our precedent and hostile to decades of settled expectations." He argued that the majority misconstrued prior cases indicating the availability of a private right of action to enforce disparate impact regulations. The dissent argued that Sections 601 and 602 are two parts of an integrated scheme and share the goal of protecting citizens against discrimination, and that the Court's holding failed to defer to the agencies' interpretation of a statute they were charged to administer.

The dissent further suggested that litigants seeking to enforce Title VI disparate impact regulations may simply assert a claim under Section 1983, which provides a broad express right of action for violations of federal law by state actors.

The Court's decision makes clear, contrary to prior holdings by many lower federal courts, that private individuals may no longer assert disparate impact claims under Title VI regulations. Governmental agencies, such as the U.S. Department of Education, may still promulgate and enforce Title VI disparate impact regulations. On the other hand, the majority opinion hinted that the Court might in a future case hold such regulations to be invalid.

Under *Sandoval*, private parties using Title VI to challenge a district's or state's alleged racial or national origin discrimination in areas such as student assignment, testing practices, or school funding must prove discriminatory intent. However, as Justice Stevens' opinion suggests, a private right of action to enforce Title VI disparate impact regulations may still be available under Section 1983.

IV. SEXUAL HARASSMENT AND GENDER DISCRIMINATION

The Court was asked to review three notable cases involving sexual harassment or gender discrimination. In one sexual harassment case, the Court unanimously ruled in favor of a school district while reaffirming several important principles governing Title VII claims; the Court declined to review another high profile sexual harassment case; and it issued a somewhat surprising, divided opinion in a case involving alleged gender discrimination by the Immigration and Naturalization Service ("INS").

A. Sexual Harassment

In *Clark County School District v. Breeden*, the Court unanimously reaffirmed that actionable sexual harassment under Title VII must be " 'so severe or pervasive' as to 'alter the conditions of [the victim's] employment and create an abusive working environment.' " The Court also clarified the kind of evidence needed to prove retaliation under Title VII.

Shirley Breeden, an employee of the Clark County (Nevada) School District, alleged that she and male colleagues together reviewed the file of a job applicant who reportedly told a female co-worker, "I hear making love to you is like making love to the Grand Canyon." At the meeting, Ms. Breeden's supervisor read the comment aloud, looked at her, and then said "I don't know what that means." Another male co-worker said, "Well, I'll tell you later," and both men chuckled. Breeden reported this event to school district personnel and subsequently filed discrimination charges with the Nevada Equal Rights Commission and the U.S. Equal Employment Opportunity Commission ("EEOC"), as well as a lawsuit against the school district. Some twenty months after she reported the incident, Ms. Breeden was transferred. In her lawsuit, she claimed that the transfer was an act of retaliation prohibited by Title VII.

The district court granted summary judgment for the school district, but the Ninth Circuit reversed, holding that, under Title VII, the transfer could have been viewed as unlawful retaliation for a protected complaint of discrimination. The Supreme Court reversed the Ninth Circuit and reinstated the district court's judgment in favor of the school district.

First, the Supreme Court found that Breeden's colleagues' conduct did not amount to prohibited sexual harassment. Under Title VII, the Court noted, actionable workplace conduct cannot be measured in isolation. Rather, the entire work environment should be considered, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with the employee's work performance." Thus, "simple teasing, offhand comments, and isolated incidents (unless extremely serious)" do not give rise to Title VII liability. The Supreme Court found that "[n]o reasonable person could have believed that the single incident" reported by Breeden violated Title VII.

The Court then addressed Breeden's retaliation claim. In addition to banning discrimination itself, including sexual harassment, Title VII also prohibits employers from retaliating against employees who report allegations of such harassment. In holding that Breeden's transfer was not unlawful retaliation for her complaint, the Supreme Court announced no sweeping new principles, but instead applied some of its recent Title VII decisions. The Court held that, where a plaintiff relies on the "temporal proximity" between her complaint and the adverse action against her to establish causation, the two events must be "very close" in time. The school district's decision to transfer Breeden 20 months after she filed discrimination charges, the Court found, "suggests, by itself, no causality at all."

Finally, the Court signaled that it will be difficult for a Title VII plaintiff to prove retaliation where the employer contemplated the adverse employment action before the employee complained of discrimination. Reasoning that employers need not suspend previously planned transfers upon discovering that a Title VII suit has been filed, the Court found that, because the Clark County School District was "contemplating the transfer" before it learned of Breeden's lawsuit, the district's decision to effect the transfer could not be deemed unlawful retaliation.

For school districts, *Breeden* helps clarify what conduct will be regarded as sexual harassment or unlawful retaliation. Notably, *Breeden* offers school districts and other employers latitude to follow through with previously planned, appropriate action to address personnel problems even after an employee has complained of discrimination.

The Supreme Court declined to review another sexual harassment case, *Davis v. DeKalb County School District*, which involved a claim brought by students sexually molested by a teacher. The students contended the school district was liable because another student had previously complained about the teacher, although no school official knew of the teacher's molestation of the plaintiffs while it was occurring. The Eleventh Circuit rejected this argument, noting that the school district had taken appropriate action in response to the prior complaint, and affirmed summary judgment for the school district. Applying the standards the Supreme Court established in recent cases, the Eleventh Circuit reaffirmed that a school district is liable for sexual harassment of students by teachers only if an official with authority to address the discrimination has actual knowledge of it and, by demonstrating "deliberate indifference to discrimination," fails to respond adequately.

B. Gender Discrimination

In another case involving sex discrimination, *Nguyen v. Immigration and Naturalization Service*, the Supreme Court considered the constitutionality of Section 1409 of the Immigration and Nationality Act. Section 1409 prescribes citizenship requirements for children born abroad and out-of-wedlock to one United States citizen parent and one noncitizen parent. Specifically, Section 1409 requires the child of a citizen father to take one of three steps (legitimation, a declaration of paternity under oath by the father, or a court order of paternity) not required of the child of a citizen-mother to establish citizenship. The plaintiff alleged that Section 1409 unlawfully discriminated against fathers on the basis of their gender.

In a split decision, the Supreme Court held that Section 1409 does not violate the equal protection guarantee of the Fifth Amendment Due Process Clause because it serves important governmental objectives and is substantially related to their achievement. The Court found that Section 1409's gender-based distinction served important governmental interests in ensuring that: (1) a biological parent-child relationship exists; and (2) the child and citizen parent have some opportunity to develop a relationship "that consists of the real, everyday ties that provide a connection between child and citizen parent."

The Court held the gender-based distinction to be permissible because "fathers and mothers are not similarly situated with regard to proof of biological parenthood" and thus "the imposition of different rules for each is neither surprising nor troublesome from a constitutional perspective." The opportunity to develop a parent-child relationship, the Court noted, "inheres in the event of birth in the case of a citizen mother and her child"; and Section 1409 "takes the unremarkable step" of ensuring that such an opportunity "exists between father and child before citizenship is conferred upon the latter." The Court rejected the argument, articulated by Justice O'Connor in dissent, that Section 1409 embodies a gender-based stereotype regarding the opportunity for relationships between mothers and children.

The Court's decision does seem to depart somewhat from the concern about gender stereotypes articulated in prior cases, such as *Mississippi University for Women v. Hogan* (1982) and *United States v. Virginia* (1996), both of which addressed single-sex education. It is unclear how broadly the notion of "basic biological differences," upon which the majority ultimately rested its decision, may be interpreted in other areas in which gender distinctions may be made.

V. STATE ACTION

During its 2000-2001 Term, the Supreme Court decided one noteworthy case addressing when an organization is a "state actor" subject to suit under 42 U.S.C. § 1983. In *Brentwood Academy v. Tennessee Secondary School Athletic Association*, the Court announced a test under which more organizations, including those with public school districts as members, may be considered state actors for Section 1983 purposes.

In *Brentwood Academy*, a private school attempted to sue the Tennessee Secondary School Athletic Association under Section 1983, alleging that restrictions on member school recruitment violated the First Amendment. The Sixth Circuit held that the association was not subject to Section 1983, which provides citizens a remedy for violations of federal rights "under color of law," because it was not a state actor. In a five-to-four decision, the Supreme Court reversed, holding that the association's regulatory activity was state action due to the "pervasive entwinement" of state and local public school officials in the association's structure and functions.

The Court's analysis began with the general premise that seemingly private conduct can be so closely related to the state that it may fairly be treated as conduct of the state itself. The Court concluded that the "nominally private character of the association [was] overborne by the pervasive entwinement of public institutions and public officials in its compositions and workings." Specifically, the Court noted that 84% of the association's membership were public schools represented by public officials acting in their official capacity; that Tennessee State Board of Education members were assigned *ex officio* to serve as members of the association's board of control and legislative council; and that the association's employees were eligible for membership in the state retirement system. The Court emphasized that every other court of appeals to address a similar statewide athletic association had found it to be a state actor.

Brentwood Academy makes clear that associations to which public school districts belong may be subject to the same constitutional requirements as the districts themselves, if those associations are sufficiently "entwined" with government bodies. If the decision is limited by the Court's fact-specific analysis, it may have little bearing beyond the special context of state athletic associations. On the other hand, as the dissent noted, if future decisions further develop the "entwinement" test, that test could affect "organizations that foster activities, enforce rules, and sponsor extracurricular competition among high schools – not just in athletics, but in such diverse areas as agriculture, mathematics, music, marching bands, forensics, and cheerleading."

VI. FEDERALISM

The 2000-2001 Term included one important decision that reflects the Supreme Court majority's continued desire to limit the reach of congressional enactments as applied to the states. In *Board of Trustees of the University of Alabama v. Garrett*, the Court resolved a split among the federal appellate courts regarding whether state employees may sue their employers for money damages in federal court under Title I of the Americans with Disabilities Act ("ADA"). In a 5-4 decision, the Court held that the ADA's abrogation of the states' Eleventh Amendment immunity was an invalid exercise of Congress's authority under Section 5 of the Fourteenth Amendment.

The *Garrett* plaintiffs were disabled employees of the State of Alabama who were denied accommodations for their disabilities. In separate actions, they sought money damages under the ADA. A federal district court granted summary judgment to Alabama in each case, ruling that the ADA exceeded Congress's authority to abrogate the states' Eleventh Amendment immunity. The Eleventh Circuit reversed, and the Supreme Court granted *certiorari*.

A majority of the Supreme Court held that the ADA does not authorize damage claims against the states. In an opinion authored by Chief Justice Rehnquist, the majority supplied two principal rationales for its holding.

First, it reasoned that Congress invalidly abrogated state immunity, because despite having ample evidence of *private* discrimination, Congress had insufficient evidence that states themselves had engaged in discrimination on the basis of disability.

Second, the Court concluded that even if Congress had enacted the ADA based on a stronger record of discrimination by the states, the remedies provided under the ADA lacked "congruence and proportionality" with the findings of constitutional violations on which they were based. Specifically, to authorize monetary damages remedies against the states in a manner consistent with its Section 5 powers, the Court held, Congress may bar only discrimination that the Constitution would prohibit. Yet the Court noted that the ADA requires reasonable modification of existing facilities for the disabled, even though it would be constitutional, under cases such as *Cleburne v. Cleburne Living Center, Inc.* (1985), for a public employer to hire only those who could effectively use existing facilities, if the employer had a "rational basis" for doing so. In addition, the majority found, the ADA permits disparate impact suits for conduct that is constitutional. Further, the majority maintained that the burden of persuasion in disability discrimination suits is altered under the ADA: The Act makes it the employer's duty to prove that it would suffer a burden if required to implement a particular accommodation, while under a constitutional analysis, the plaintiff must prove that there was no reasonable basis for the employer's decision. These expansions of the constitutional prohibition against disability discrimination, the Court concluded, exceeded Congress's Section 5 power.

Justice Breyer authored a dissent, joined by three other Justices, that questioned the majority's "evidentiary demands, . . . non-deferential review, and . . . failure to distinguish between judicial and legislative constitutional competencies." The dissent noted that Congress had compiled a "vast legislative record documenting massive, society-wide discrimination against persons with disabilities" and concluded that Congress could reasonably have inferred discrimination by the states from the extensive evidence of discrimination by local governments and private actors.

The Supreme Court also declined to review two other noteworthy cases raising federalism issues, leaving undisturbed lower court rulings upholding the application of other federal statutes to the states. In *Jim C. v. United States*, the Eighth Circuit held that the application to the states of Section 504 of the

Rehabilitation Act of 1973, which forbids discrimination on the basis of disability by recipients of federal assistance, is a valid exercise of Congress's spending power. The court of appeals held that states waive their Eleventh Amendment immunity by accepting federal assistance, and individuals thus may pursue damages claims against the states under Section 504. Similarly, in *Varner v. Illinois State University*, the Seventh Circuit rejected a state university's invocation of Eleventh Amendment immunity as a defense to suits for damages under the Equal Pay Act ("EPA"). The court of appeals reasoned that the EPA, unlike the ADA, is not aimed at discrimination that receives only "rational basis" review under an Equal Protection Clause analysis. As a result, the court concluded that, in most cases, the EPA would not subject state employers to liability in situations where the Constitution would not.

School districts may or may not be directly affected by *Garrett* depending upon their status under state law. Districts that enjoy their states' Eleventh Amendment immunity, a question resolved by state law, would no longer be subject to damage claims under the ADA. On the other hand, districts that are not considered arms of the state for Eleventh Amendment immunity purposes would not enjoy such protection. Further, all school districts may remain subject to damage claims under Section 504 or state anti-discrimination laws, and to non-monetary relief, such as injunctive relief, under the ADA. *Garrett* is also noteworthy because it continues the Supreme Court's pattern in recent years of issuing sharply divided federalism decisions restricting congressional authority vis-à-vis the states.

VII. AMERICANS WITH DISABILITIES ACT

In addition to its decision in *Garrett*, the Supreme Court decided two other cases in the 2000-2001 Term that addressed the ADA. In one case, *PGA Tour, Inc. v. Martin*, the Court ruled that the PGA Tour must allow a disabled golfer to use a golf cart in tournaments. In the other, *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, the Court clarified when attorney's fees may be awarded under the ADA and other similar federal statutes.

PGA Tour, Inc. v. Martin concerned Casey Martin, a professional golfer who suffers from a circulatory disorder that renders him unable to walk the course during a round of golf. Under PGA rules, golfers may not use golf carts in tournaments. When the PGA Tour refused Martin's request to use a cart, he sued.

The Supreme Court upheld Martin's claim that his use of a cart was a reasonable accommodation required by the ADA. The Court first concluded that Title III of the ADA, which prohibits owners and operators of "public accommodations" from discriminating against individuals on the basis of disability, applied to the PGA Tour because the qualifying competition for PGA Tour tournaments is open to members of the public. Next, the Court found that allowing Martin to use a golf cart was a reasonable modification of PGA rules and not a fundamental alteration of the rules of the game. According to the Court, shot-making, not walking, is the indispensable feature of the game of golf.

Justice Scalia authored a searing dissent, which Justice Thomas joined. In their view, Title III of the ADA would not apply because it bars public accommodations from discriminating against their "clients and customers," not the golfers who compete in PGA Tour events. Martin's relationship to the PGA Tour, the dissent contended, was more like that of an independent contractor and therefore exempt from Title III, as well as from Title I, which covers employees. The dissent also criticized the majority for determining whether walking was a fundamental aspect of golf and attempting to level the playing field for a disabled professional athlete. The dissent predicted that the Court's decision in *Martin* would spawn litigation, in sports at various levels, over which rules are "fundamental" and whether a rule modification would give a disabled athlete an unfair advantage.

After its *Martin* decision, the Supreme Court vacated and remanded a conflicting Seventh Circuit case. In *Olinger v. United States Golf Association*, the Seventh Circuit had held that modifying the rules of the United States Open golf tournament to allow Ford Olinger to use a golf cart would "fundamentally alter" the nature of the game.

Martin may well lead to new litigation against public school districts. The Court's fact-intensive analysis of the requested rule modification raises the possibility that school districts will be required to justify decisions not to accommodate disabled student-athletes with rule changes or waivers in school sports. Although under this Term's *Garrett* decision, public school districts that are covered by state Eleventh Amendment immunity are no longer subject to damages in federal court ADA suits, those districts still may be sued for injunctive relief, such as an order requiring accommodation of a disabled student in an athletic program. Therefore, school districts should review carefully requests by disabled students for rule changes or waivers and provide reasonable modifications where they would not fundamentally alter the game or confer an unfair competitive advantage.

In another ADA case, ***Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources***, the Supreme Court considered whether federal statutory provisions that allow the prevailing party in a lawsuit to recover attorney's fees apply when there was no court-ordered change in the relationship between the parties. Buckhannon Board and Care Home, Inc. ("Buckhannon") sued under the ADA and the Fair Housing Amendments Act ("FHAA") when the state ordered it to close its residential care facility. An inspection had revealed that occupants were incapable of "self-preservation," or moving themselves in case of a fire. After Buckhannon sued, the state legislature eliminated the "self-preservation" requirement and, consequently, a federal district court dismissed the case as moot. Buckhannon requested an award of attorney's fees under the ADA and FHAA on grounds that, by bringing the lawsuit, it succeeded in changing the state's conduct.

507

The Supreme Court held that *Buckhannon* could not recover attorney's fees because there was no court-ordered change in the relationship between the parties, such as a judgment on the merits or a consent decree enforcing a settlement agreement. A five-Justice majority held that statutory language permitting attorney-fee awards to the "prevailing party" applies only to parties who received court-awarded relief. The state's voluntary change of conduct lacked the necessary official judicial approval.

Buckhannon also had argued that the "catalyst theory" should apply to allow attorney's fees. The catalyst theory allows recovery of attorney's fees by a party who brings about change in the defendant's behavior, regardless of whether that change was court-ordered. The Supreme Court concluded that legislative intent was ambiguous regarding the catalyst theory. However, the Court noted that the "American Rule" provides that parties will not be awarded attorney's fees absent explicit statutory authority. Accordingly, the ambiguous legislative history could not overcome the "clear meaning of 'prevailing party' – the term actually used in the statute." Thus, the Court rejected the catalyst theory.

Buckhannon may affect not only school districts sued under the ADA, but also those sued under other federal civil rights statutes. Chief Justice Rehnquist, writing for the *Buckhannon* majority, pointed out that Congress has authorized attorney's fee awards to the "prevailing party" in other statutes, such as the Civil Rights Act of 1964, and the Court has interpreted the fee-shifting provisions of these statutes consistently. *Buckhannon* may provide defendants in such lawsuits, including school districts, with an incentive to take corrective actions before a final judgment or settlement agreement in order to avoid attorney's fees.

The Supreme Court declined to hear almost 20 other cases that involved ADA issues. Most of these cases dealt with fact-specific determinations regarding whether an individual or condition met statutory requirements necessary for an ADA claim or whether an employer made reasonable accommodations for a disabled employee. One of the cases that the Court declined to review was particularly relevant to school districts. The case involved a university clerical employee who wished to sue to allege an ADA violation, but was covered by a collective bargaining agreement that required all disputes to be submitted to arbitration. In *Rogers v. New York University*, the Second Circuit found that such arbitration provisions are not enforceable because they prevent the employee from exercising his or her right to be heard in federal court, and in this case, the individual employee had not clearly and unmistakably waived her right to a federal forum.

VIII. FREEDOM OF SPEECH

During the 2000-2001 Term, in addition to its ruling in *Milford*, the Supreme Court decided three other freedom of speech cases that are relevant to public education. The Court also declined to review several significant First Amendment cases.

In *Lorillard Tobacco Co. v. Reilly*, the Supreme Court struck down on First Amendment grounds two Massachusetts laws that prohibit outdoor and point-of-sale advertising of smokeless tobacco and cigars within a 1000-foot radius of a public playground or elementary or secondary school. According to the Court, while the advertising regulations were intended to serve legitimate state interests (preventing youth-targeted advertising campaigns and limiting young people's exposure to cigar and smokeless tobacco advertising), there was not a reasonable fit between the means and the ends of the regulatory scheme. Given the "broad sweep of the regulations," the Court concluded that "the Attorney General did not carefully calculate the costs and benefits associated with the burden on speech imposed by the regulations." The Court noted in particular that the outdoor regulations at issue would prohibit advertising in 87% to 91% of Boston, Worcester, and Springfield, Massachusetts. The Court found that these regulations "would constitute nearly a complete ban on the communication of truthful information about smokeless tobacco and cigars to adult consumers." The Court's invalidation of the state's advertising regulations suggests that even when the Court finds that the state has designed a regulatory regime to further important governmental interests, its means of effectuating those interests must not be overly burdensome.

In *Bartnicki v. Vopper*, the Supreme Court balanced the privacy interests of individuals in confidential conversations with the First Amendment rights of the media to publicize information of public concern. The Court held in a 6-3 ruling that a broadcaster who obtained illegally recorded cell phone conversations could broadcast them because they pertained to significant public issues.

Bartnicki arose in the context of contentious negotiations between the teachers' union at a public high school and the local school board. During the course of negotiations, someone intercepted and recorded a telephone conversation between the union's president and its chief negotiator. A local radio commentator obtained the recording and repeatedly broadcast it, even though he had reason to believe it was recorded illegally. The Court held that, under these circumstances, the First Amendment protects those who disclose communications regarding matters of public significance, as long as they were not involved in the initial unlawful interception and received the material lawfully. In this context, the majority concluded that the longstanding rule against prior restraint on publication outweighs the individual interest in privacy.

The majority recognized the potential chilling effect that permitting disclosure could have on private communication, but reasoned that core purposes of the First Amendment are served by permitting publication of truthful information of public concern. The majority also held that by participating in a public debate over the proper compensation of public school teachers, the union president and negotiator in this case accepted some loss of privacy.

One implication of this decision is to underscore the importance of ensuring that private conversations concerning sensitive school board business be conducted on secure telephone lines rather than on cellular or cordless telephones. The decision also reminds school officials that as public figures their private communications may be entitled to reduced privacy protection.

In *Legal Services Corporation v. Velazquez*, the Supreme Court upheld a First Amendment challenge to a funding restriction placed on the Legal Services Corporation ("LSC"), a nonprofit corporation created by Congress to distribute funds to local organizations that provide free legal assistance to indigent clients. The funding condition at issue prohibited LSC-funded attorneys from undertaking representations that involved any effort to amend or otherwise challenge existing state or federal welfare laws. In a five-to-four decision, the Court affirmed the Second Circuit's ruling and held that the restriction imposed on LSC-funded representation was inconsistent with the First Amendment.

Writing for the majority, Justice Kennedy articulated four reasons for striking down the condition on LSC funding. First, the Court found that the LSC program was designed to facilitate the private speech of an indigent client, not to promote or deliver a particular governmental message. Second, the government's attempt to limit the advice that attorneys could give their clients and the arguments that they could make had the effect of distorting the advocacy of the lawyers and the functioning of the judicial system. Third, the Court found that the judicial function was greatly impaired by the regulation's requirement that an LSC-funded attorney cease representation if a question of statutory validity arose. Fourth, because the funding condition had the effect of prohibiting attorneys from advising their clients or arguing to a court that existing welfare laws are unconstitutional, these laws would be effectively insulated from constitutional scrutiny.

In dissent, Justice Scalia argued that this case was indistinguishable from the Court's 1991 decision in *Rust v. Sullivan*, in which the Court held that Congress could lawfully prohibit doctors employed at federally funded clinics from discussing abortion with their patients.

The *Velazquez* decision illustrates the fundamental principle that the government cannot suppress the expression of private speech simply because it might be inconsistent with the state's interests, a principle often applied in the context of public schools. Moreover, *Velazquez* is also a reminder that the First Amendment limits the conditions that may be imposed on public funding.

The Supreme Court also declined to review a number of decisions directly implicating the First Amendment rights of students:

- In *Denno v. School Board of Volusia County*, the Eleventh Circuit rejected a Section 1983 claim brought against two assistant high school principals and the school board on behalf of a student who was suspended for peacefully displaying a confederate flag during the school lunch break.
- In *Boroff v. Van Wert City Board of Education,* the Sixth Circuit court of appeals held that the school had not acted in a "manifestly unreasonable manner" by prohibiting a student from wearing t-shirts depicting a rock musician, Marilyn Manson, known for violent and antisocial lyrics.
- In *Hollingsworth v. Lane Community College,* the Ninth Circuit rejected a First Amendment claim brought by three former students of Lane Community College who objected to the distribution of a percentage of mandatory student fees to the Oregon Student Public Interest Research Group Education Fund.
- In *Brister v. Faulkner,* the Fifth Circuit held that the campus of the University of Texas was a public forum indistinguishable from the city sidewalks and accordingly invalidated the university's policy of prohibiting leafleting by non-students on school property.

These court of appeals decisions involving student speech define a relatively narrow conception of the First Amendment as it pertains to public school students. *Denno, Boroff*, and *Hollingsworth* suggest that public schools have fairly wide discretion to set appropriate standards for student speech and to ensure that such speech is not inconsistent with the particular institution's basic educational mission. *Brister*, on the other hand, is a reminder that school districts must be cautious in regulating speech where they have created a public forum.

The Court also declined to review two cases involving public employees' free speech rights:

- In *Downs v. Los Angeles Unified School District*, the Ninth Circuit held that the defendant school district did not violate a public high school teacher's First Amendment rights when it ordered the removal of bulletin board materials that he had posted to reflect a perspective contrary to materials displayed by the school in honor of the district's Gay and Lesbian Awareness Month.
- In *Urofsky v. Gilmore*, the Fourth Circuit held that a Virginia law restricting state employees from accessing sexually explicit material on computers owned or leased by the state did not violate the First Amendment rights of university faculty.

IX. FOURTH AMENDMENT

In the past, the Supreme Court has upheld against Fourth Amendment challenge programs involving suspicionless searches that were designed to serve "special needs" beyond the normal need for law enforcement. The drug-testing of student-athletes upheld in the Court's 1995 decision in *Vernonia School Dist. 47J v. Acton* is an example of such a special needs search. This Term, the Court dealt with two particular "special needs" cases.

In *Ferguson v. City of Charleston*, the Court reviewed a program conducted by a Charleston, South Carolina public hospital under which pregnant patients were tested for drug use. Several pregnant patients were arrested after testing positive for cocaine. Because the urinalysis tests were conducted without warrants or the patients' consent, the Court held that the tests constituted unreasonable searches in violation of the Fourth Amendment. The Court acknowledged that the ultimate goal of the program may well have been to get women into drug treatment, but found the immediate objective to be the generation of evidence for law enforcement purposes.

In *City of Indianapolis v. Edmond*, the Supreme Court struck down a highway checkpoint program aimed at finding illegal drugs. Because the Court found the checkpoint program's primary purpose to be indistinguishable from a general interest in crime control, it concluded that the checkpoints violate the Fourth Amendment. While this decision, like *Ferguson*, underscores the requirement that suspicionless searches be justified by and designed to serve particular "special needs," it should not significantly affect administrative searches for school safety purposes. The Court in *Edmond* specifically noted that its decision does not affect the validity of "searches in airports and government buildings, where the need for such measures to ensure public safety can be particularly acute."

X. LABOR AND EMPLOYMENT

This Term, the Supreme Court issued several decisions regarding arbitration issues that could affect public school districts in their role as employers.

In *Circuit City Stores, Inc. v. Adams,* the Supreme Court addressed the scope of the Federal Arbitration Act ("FAA"), which requires courts to enforce arbitration agreements. The Court held that the exemption in Section 1 of the FAA applies only to transportation workers and that arbitration clauses in all other employment contracts therefore may be valid and enforceable. The five Justices in the majority found that the exemption clause, which states that the Act shall not apply to "contracts of employment of seamen, railroad employees, or any other class of worker engaged in foreign or interstate commerce," could not be construed to apply to all employment contracts. Instead, the Court reasoned that the interpretation of the third phrase must include only employment contracts similar to the first two enumerated groups. Therefore, the Act exempts only contracts of transportation workers.

In addition to addressing the arbitrability of certain employment disputes, the Supreme Court also examined the role of the courts in reviewing the results of arbitrations. In *Major League Baseball Players Ass'n v. Garvey*, the Court reviewed a Ninth Circuit decision that had both rejected an arbitrator's factual findings and resolved the case on the merits without remanding for further arbitration proceedings. In a summary reversal, the Supreme Court held that the Ninth Circuit should not have disturbed the arbitrator's determination. The only time an arbitration decision may be rejected, according to the Court, is when the arbitrator essentially "dispenses his own brand of industrial justice." Even then, the reviewing court should only vacate the award and should remand the dispute for another arbitration.

Garvey confirms for employers, including school districts, that arbitration awards are generally meant to have finality. Courts give great deference to arbitration decisions because the parties agreed to have their dispute settled by an arbitrator, not a court. Even if an arbitrator's decision is capricious, under *Garvey*, a court cannot itself resolve the underlying dispute but may merely require another arbitration.

The Supreme Court also reaffirmed the strong federal labor law policy of judicial deference to arbitration in *Eastern Associated Coal Corp. v. United Mine Workers*. The case involved an employer's claim that an arbitrator's order of reinstatement was unenforceable as contrary to public policy. An employee, who had failed two drug tests, was discharged under a collective bargaining agreement requiring "just cause" for dismissal. The arbitrator ruled that discharge was too severe and ordered conditional reinstatement. The employer asked the federal courts to vacate the arbitrator's decision.

The Supreme Court, however, upheld the arbitrator's decision. The Court found the collective bargaining agreement granted the arbitrator the authority to interpret the meaning of the contract's language, including the term "just cause." For the arbitrator's interpretation and award to be found to violate public policy, the Court reasoned the public policy must be "explicit," "well-defined," and "dominant." Because neither the congressional regulatory scheme nor the implementing regulations mandated discharge for an employee who tests positive for drug use, even in a safety-sensitive position, the Court refused to infer a public policy on that issue.

In yet another arbitration case, *Green Tree Financial Corp. v. Randolph*, the Supreme Court upheld an arbitration agreement that did not specify how arbitration costs were to be allocated. The plaintiff claimed that the arbitration clause in her mobile home financing agreement, by compelling arbitration of all claims arising under the agreement without specifying the means by which the costs of arbitration were to be allotted, should be found unenforceable. Although the Eleventh Circuit agreed with the plaintiff that the clause's failure to allocate the costs of arbitration could impair the plaintiff's ability to vindicate her statutory rights, the Supreme Court reversed, finding that the clause at issue was not *per se* unenforceable.

In reversing the Eleventh Circuit, the Supreme Court found that the plaintiff's claim was based only on the *possibility* that arbitration costs might be prohibitive, and refused to surmise that her statutory rights were in jeopardy based on such speculation. Instead, the Court stated that "where, as here, a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." Although the arbitration clause at issue was not *per se* unenforceable, school districts generally should consider including in arbitration clauses provisions that address arbitration costs, both to ensure the enforceability of arbitration agreements and to protect employee rights.

The combination of *Circuit City, Garvey, Eastern Associated Coal*, and *Green Tree* shows the strong support in federal law, as interpreted by the Supreme Court, for arbitration as a dispute resolution mechanism. Together, these cases bolster the enforceability of well-drafted arbitration clauses in employment contracts and the finality of arbitration awards.

Courts will not enforce the application of arbitration clauses to federal civil rights actions, however, where both parties did not clearly consent to arbitration. That principle is illustrated by *Rogers v. New York University*, a case involving a university's attempt to have ADA claims arbitrated in which, as noted in Section VII above, the Supreme Court denied *certiorari*. In *Rogers*, the Second Circuit denied the university's motion for a stay pending arbitration, because adequate evidence of the employee's consent to arbitration was lacking. Most federal appellate courts that have addressed the issue similarly have found union-negotiated arbitration clauses to be unenforceable where they purport to waive an employee's right to sue under federal statutes. Therefore, school districts that contract with employees through collective bargaining agreements and want to enforce arbitration provisions should consider how best to demonstrate their employees' clear and unmistakable waiver of federal statutory rights. For example, as suggested by the court of appeals in *Rogers*, school districts could negotiate contracts that either specifically agree to the submission to arbitration of all federal causes of action arising out of employment or specifically incorporate anti-discrimination laws by name or citation.

Finally, the Supreme Court declined to review one notable employment case that did not involve arbitration. In *Rice v. Sunrise Express, Inc.*, the Seventh Circuit reversed a jury verdict for a woman asserting a Family Medical Leave Act ("FMLA") violation, concluding that the district court had erroneously instructed the jury that statutory language requires the employer to prove the legitimacy of its employment decision. The court of appeals held that the plaintiff bears the burden to prove that her employer would not have terminated her had she not taken medical leave. The question of who bears the burden of proof will be important for any school district facing a similar FMLA claim.

XI. PUNITIVE DAMAGES

During the 2000-2001 Term, the Supreme Court held in *Cooper Industries Inc. v. Leatherman Tool Group Inc.* that appellate courts should review punitive damage awards *de novo* and should apply the three-prong test previously announced in *BMW of North America, Inc. v. Gore*.

The plaintiff in *Cooper Industries*, a manufacturer of pocket tools similar to the Swiss Army knife, alleged that a competitor violated the federal trademark law and engaged in unfair competition in connection with a similar product. A jury awarded the plaintiff $50,000 in compensatory damages and $4.5 million in punitive damages. The district court judge, applying *BMW of North America, Inc. v. Gore,* determined that the punitive damages award was not "grossly excessive" and thus did not violate the defendant's constitutional rights. On appeal, the Ninth Circuit also affirmed the punitive damage award, applying an "abuse of discretion" standard to the district court's decision. The Supreme Court granted certiorari to clarify "confusion" among the federal appellate courts regarding the standard to apply in reviewing trial judges' determinations about the constitutionality of punitive damage awards.

While the Supreme Court acknowledged that legislatures have broad discretion in setting the range of permissible punishments for violations of law and that judges accordingly have discretion to uphold punitive damage awards that fall within statutory limits, the Court concluded that the Constitution limits that discretion. The Eighth Amendment prohibits "excessive fines and cruel and unusual punishments." In conjunction with the Fourteenth Amendment Due Process Clause, it prohibits states from enforcing "grossly excessive" punishments against tortfeasors. The Court held that, unlike the measure of actual damages, which presents factual questions, judges' application of these constitutional provisions to the measure of punitive damages is a question of law. Accordingly, the Court held, federal appellate courts may review such determinations without any special deference to the trial court. The Court found this distinction important because questions of fact, decided by the jury, are protected under the Seventh Amendment and must be accepted by the appellate court unless they are "clearly erroneous." On the other hand, the Seventh Amendment is not implicated by a trial court's determination of purely legal issues, and thus *de novo* review of the constitutionality of punitive damages awards is appropriate.

Cooper Industries could affect any school district that becomes subject to a large punitive damage award, because it increases the freedom of appellate courts to reduce such awards. Yet, as the Supreme Court acknowledged, its decision in *Cooper Industries* likely will affect few cases: The Court did not alter the test that trial judges apply to review a jury's punitive damage award in the first instance; some states already set maximum punitive damage awards by statute; and some state and federal statutes exempt public school districts, and other governmental entities, from punitive damages altogether.

XII. RACE-CONSCIOUS DECISIONMAKING

The Supreme Court did not decide any cases addressing affirmative action or race-conscious decisionmaking issues during its 2000-2001 Term. The Court denied *certiorari* in two closely watched cases involving affirmative action in higher education admissions, as well as in a case permitting a public laboratory school to consider race in assigning students.

In the latter case, the Ninth Circuit upheld the race-conscious admissions policy of a research-oriented public school run by the University of California. In *Hunter ex rel. Brandt v. Regents of University of California*, the court of appeals held that the state's interest in improving the quality of education in urban public schools was "compelling" and that the school's use of race and ethnicity as a factor in the admissions policy was "narrowly tailored" to serve that interest.

Therefore, the school's admissions policy was held to withstand the "strict scrutiny" test under which racial and ethnic classifications by government are reviewed.

The Supreme Court also declined to review two cases that reflect a growing circuit split on the question whether diversity is a constitutionally permissible objective that allows universities to consider race or ethnicity in admissions decisions. In *Smith v. University of Washington Law School*, the Ninth Circuit upheld the constitutionality of the University of Washington Law School's race-conscious admissions policy. The court of appeals reaffirmed the principle, announced by Justice Powell in *Regents of the University of California v. Bakke*, that diversity in higher education may be a compelling interest justifying the consideration of race in admissions. The court also found that the admissions policy at issue was narrowly tailored to advance that interest.

On the other hand, the Supreme Court declined for the second time an opportunity to review a decision that directly conflicts with the Ninth Circuit's holding. In 1996, the Fifth Circuit concluded in *Hopwood v. Texas* (*"Hopwood I"*) that the University of Texas Law School was barred from using race as a factor in admissions. The court held that diversity cannot be a compelling governmental interest under the Fourteenth Amendment and interpreted Supreme Court precedent as holding that no governmental interest, other than remedying past racial discrimination, could ever justify racial classifications. In *Hopwood II*, the most recent appeal, a different Fifth Circuit panel upheld a lower court's denial of damages to the plaintiffs, on the ground that they would have had no reasonable chance of being admitted to the law school under a race-blind admissions process, but declined Texas's request to overturn the *Hopwood I* holding that diversity is not a compelling interest. The Supreme Court's determination not to review *Hopwood II* effectively ends the case.

XIII. A PREVIEW OF THE 2001-2002 TERM

A. Race-Conscious Decisionmaking

The growing split among circuits on the question whether race may be considered in student admissions decisions, seen clearly in the recent *Hopwood II* and *Smith* cases, leads many observers to believe that the Supreme Court will address this issue in coming years. In addition to the Fifth and Ninth Circuit cases discussed above, the Eleventh Circuit is reviewing a district court decision that held unconstitutional race-conscious admissions at the University of Georgia. And, in a closely watched case, the Sixth Circuit will review two directly conflicting decisions from the same lower court, the Eastern District of Michigan, in cases involving undergraduate and law school admissions at the University of Michigan. Although neither the Sixth nor the Eleventh Circuit had issued a decision as this summary went to press, the Supreme Court may have an opportunity next Term to decide whether to hear these cases. If the Court does so, its decision could affect consideration of race by school districts in a variety of contexts, depending on how broadly or narrowly the Court frames its decision.

The Supreme Court already has agreed to hear one affirmative action case next Term. The Court will hear *Adarand v. Mineta*, a case that it has reviewed twice before. *Adarand* involves a challenge by a non-minority subcontractor to the constitutionality of a federal program designed to increase contracting opportunities for businesses owned by socially and economically disadvantaged individuals. The program compensated government contractors that hired as subcontractors "disadvantaged business enterprises" ("DBEs"). Businesses owned and controlled by racial and ethnic minorities or by women were presumed to be DBEs. In 1995, when the case first reached the Supreme Court, the Court held that all racial classifications, even those authorized by federal statute, must be analyzed using strict scrutiny. Under strict scrutiny, a governmental program using racial classifications is not constitutional unless it furthers a compelling governmental interest and is narrowly tailored to meet its goal.

In the upcoming Term, the Supreme Court will review a ruling by the Tenth Circuit that the affirmative action program at issue in *Adarand* is narrowly tailored to further the compelling governmental interests of remedying and not perpetuating the effects of past racial discrimination. The Tenth Circuit found that the practice of presuming that businesses owned by minorities and women were DBEs was not narrowly tailored to achieve these goals. Because the program had been amended to require a contracting firm's owners to state directly whether they had experienced social disadvantage stemming from discrimination, however, the Tenth Circuit held that the amended program was constitutional.

B. FERPA

The Supreme Court also has agreed to review next Term the Tenth Circuit's widely reported decision in *Falvo v. Owasso Independent School District*, which addresses whether the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, permits students to grade one another's work. FERPA generally prohibits school districts and other educational institutions that receive federal funds from releasing "education records" without parental or student consent. In *Falvo*, a parent of 6th, 7th, and 8th grade students in the Owasso (Oklahoma) Public Schools claimed that having students grade other students' papers and call out those grades in class violated FERPA. In upholding the parent's FERPA claim, the Tenth Circuit held that the grades were "education records" because they were directly related to the student and because both the teachers and the students were "person[s] acting for" the school. Four judges dissented from the denial of a petition for rehearing by the entire court of appeals. These judges would not have considered students' placement of grades on papers, as opposed to teachers' entry of grades into grade books, to create education records under FERPA, and therefore would have upheld the peer-grading practice.

C. Americans with Disabilities Act

The Supreme Court also has agreed to review two cases involving the ADA during its 2001-2002 Term. In one of those cases, *Williams v. Toyota Motor Manufacturing, Kentucky, Inc.*, the Court will consider whether an employee impaired from performing a limited number of tasks associated with a specific type of job has a disability under the ADA. The Sixth Circuit held that a factory worker unable to perform manual tasks as a result of carpal tunnel syndrome and tendonitis was disabled under the ADA. That court held that the plaintiff's injuries, so severe as to be comparable to missing limbs, substantially limited a major life activity. In conflict with other circuits, the Sixth Circuit did not define the impaired major life activity as "work," but rather as performing repetitive "manual tasks" that are job-related. If the Supreme Court upholds this decision, it could affect schools whose clerical employees or vocational teachers, for example, are disabled with respect to a certain class of activities required for such jobs.

The Supreme Court has also agreed to review *Barnett v. U.S. Airways, Inc.*, a case involving a conflict between an employer's seniority system and a disabled employee's need for accommodation. *Barnett* involved an employee whose injuries rendered him unable to perform his duties as a cargo handler, but able to perform mailroom duties; however, other employees were entitled to mailroom positions under the employer's seniority system. In *Barnett*, the Court will consider whether the employer must disregard the rights of other employees under its seniority system in order to make a reasonable accommodation for an employee's disability. The Ninth Circuit held that there is no *per se* bar against accommodating disabled employees in the context of seniority systems. The court of appeals found that the presence of a seniority system should be a factor in determining whether the accommodation creates undue hardship for the employer.

D. Federalism

The Supreme Court also has agreed to review *Regents of the University of Minnesota v. Raygor*, which involves the intersection of federal supplemental jurisdiction, the Eleventh Amendment, and state law claims against a state defendant. The plaintiffs in *Raygor* originally filed suit in federal court, alleging age-based discrimination in violation of the Minnesota Human Rights Act ("MHRA") and the Age Discrimination in Employment Act. The University filed a motion to dismiss, which the court granted, holding that the Eleventh Amendment bars a suit against a state by citizens of that state in federal court.

Shortly after the district court granted the motion to dismiss, plaintiffs filed suit under the MHRA in state court. The University challenged the state court action, claiming that it was barred by the statute of limitations.

The question before the Supreme Court of Minnesota in *Raygor* was whether 28 U.S.C. § 1367, the federal supplemental jurisdiction statute, can toll the statute of limitations for a state law claim against a state defendant. Tolling under § 1367 essentially ensures that a plaintiff does not lose his opportunity to file suit in state court while the same or a related claim is pending in federal court. The federal statute provides a 30-day period in which plaintiffs may bring suit in state court after a federal court dismisses a state law claim. By its terms, the section applies to any claim asserted under a federal court's supplemental jurisdiction. However, the state supreme court in *Raygor* held that the tolling provision cannot apply to a state law claim against a state defendant because the statute cannot trump the protections afforded states by the Eleventh Amendment. The Minnesota Supreme Court reasoned that, since the Eleventh Amendment grants a state immunity against suit unless the state chooses to waive it, Congress lacks authority to lengthen the period during which the state is subject to suit in state court.

E. Vouchers

The Supreme Court has not yet decided whether to review *Simmons-Harris v. Zelman*, a Sixth Circuit decision concerning the constitutionality of the Cleveland, Ohio school voucher program. Both the district court and the court of appeals held that the voucher program violates the Establishment Clause of the First Amendment to the United States Constitution. The State of Ohio and the Bush Administration have asked the Supreme Court to review that conclusion.

In *Zelman*, the district court held that the Cleveland voucher program violated the Establishment Clause as a matter of law. The court applied the traditional Establishment Clause test announced by the Supreme Court in *Lemon v. Kurtzman* (1971) and rearticulated in *Agostini v. Felton* (1997). Under that test, to comport with the Establishment Clause, a law or policy must have a secular purpose and must not have the effect of advancing religion. The court found that the Cleveland voucher program violates the Establishment Clause because it advances religion. Under *Agostini*, to avoid the effect of advancing religion, a law or policy must not "result in government indoctrination, define its recipients by reference to religion, or create excessive entanglement."

The Sixth Circuit affirmed the district court's conclusion that the Cleveland voucher program violates the Establishment Clause. The court found that the voucher program advances religion because the program does not ensure that public monies will only support secular purposes, but instead actually promotes sectarian schools.

One judge of the three-judge Sixth Circuit panel dissented and argued that the 1973 Supreme Court case relied on by the majority as dispositive, *Committee for Public Education v. Nyquist*, is distinguishable on its facts and based on a now-outdated interpretation of Establishment Clause jurisprudence. The dissenting opinion argued that the voucher program is neutral with respect to religion because parents make two choices: whether to participate and whether to send their child to a sectarian school.

F. Title VII

The Supreme Court has also agreed to review a case that presents a circuit split regarding the validity of a U.S. Equal Employment Opportunity Commission ("EEOC") regulation. The rule at issue allows discrimination charges to be verified through oath or affidavit outside of the statutory time limit if the verification "relates back" to a charge initially filed within the required statutory timeframe. In *Edelman v. Lynchburg College*, the Fourth Circuit, as the Eighth Circuit had previously, concluded that this EEOC regulation conflicted with the language of Title VII. The Fifth, Seventh, Ninth, and Tenth Circuits, however, have all allowed claims based on late charges under the EEOC rule. Should the Court choose to resolve this split, and to adopt the Fourth Circuit view, its decision could pave the way for employers, including school districts, to move to dismiss lawsuits based on charges verified after the statutory deadline.

G. Special Education

During its 2001-2002 Term, the Supreme Court also may address whether non-lawyers may be prohibited from assisting parents in special education due process hearings. The Court has been asked to review the Delaware Supreme Court's decision in *In re Arons*. In *Arons*, the Delaware court held that the founder and executive director of a non-profit organization that provides advice, counseling, and advocacy services to families of children with disabilities had engaged in the unauthorized practice of law. The court also held that families of children with disabilities do not have a right under the Individuals with Disabilities Education Act ("IDEA") to representation by non-attorneys in administrative hearings.

By its terms, IDEA provides that a party has "the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities." Many states permit non-lawyers to represent parents in such hearings. Following the decision in *Arons*, the United States filed a brief in support of the request for Supreme Court review. The Supreme Court may decide to review this case to resolve this conflict.

APPENDIX: CASES AND OTHER AUTHORITIES DISCUSSED IN THIS SUMMARY

Cases:

Adarand Constructors, Inc. v. Slater, 228 F.3d 1147 (10th Cir. 2000), *cert. granted sub nom. Adarand Constructors, Inc. v. Mineta,* 121 S. Ct. 1598, 149 L. Ed. 2d 464 (2001) 45-46

Adler v. Duval County School Board, 531 U.S. 801, 121 S. Ct. 31 (2000), *vacating* 206 F.3d 1070 (11th Cir. 2000), *judgment reinstated on remand*, 250 F.3d 1330 (11th. Cir. 2001) 7

Agostini v. Felton, 521 U.S. 203, 117 S. Ct. 1997 (1997) 50

Alexander v. Sandoval, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001) 1, 13-15

Barnett v. U.S. Airways, Inc., 228 F.3d 1105 (9th Cir. 2000), *cert. granted*, 121 S. Ct. 1600 (2001) 48

Bartnicki v. Vopper, 121 S. Ct. 1753, 149 L. Ed. 2d 787 (2001) 31-32

Bennett v. Kelley, 531 U.S. 28, 121 S. Ct. 446 (2000) 11

BMW of North America, Inc. v. Gore, 517 U.S. 559, 116 S. Ct. 1589 (1996) 41-42

Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356, 121 S. Ct. 955 (2001) 22-26, 28

Boroff v. Van Wert City Board of Education, 220 F.3d 465 (6th Cir. 2000), *cert. denied*, 121 S. Ct. 1355, 149 L. Ed. 2d 286 (2001) 34, 35

Brentwood Academy v. Tennessee Secondary School Athletic Association, 531 U.S. 288, 121 S. Ct. 924 (2001) 20-22

Brister v. Faulkner, 214 F.3d 675 (5th Cir.), *cert. denied*, 121 S. Ct. 442, 148 L. Ed. 2d 447 (2000) 34, 35

Cases (Continued):

Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001) 26, 28-30

Bush v. Gore, 531 U.S. 98, 121 S. Ct. 525 (2000) (per curiam) 7-9

C.H. ex rel. Z.H. v. Oliva, 226 F.3d 198 (3d Cir. 2000) (en banc), *cert. denied*, 121 S. Ct. 2519, 69 U.S.L.W. 3383 (2001) 6

Campbell v. St. Tammany's School Board, 121 S. Ct. 2518, 69 U.S.L.W. 3775 (2001), *vacating* 206 F.3d 482 (5th Cir. 2000) 6

Chandler v. Siegelman, 230 F.3d 1313 (11th Cir. 2000), *cert. denied*, 121 S. Ct. 2521, 69 U.S.L.W. 3702 (2001) 7

Chen v. City of Houston, 206 F.3d 502 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 2020, 149 L. Ed. 2d 1017 (2001) 12

Circuit City Stores, Inc. v. Adams, 121 S. Ct. 1302, 149 L. Ed. 2d 234 (2001) 37, 40

City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 105 S. Ct. 3249 (1985) 23-24

City of Indianapolis v. Edmond, 531 U.S. 32, 121 S. Ct. 447 (2000) 36

Clark County School District v. Breeden, 121 S. Ct. 1508, 149 L. Ed. 2d 509, *reh'g denied*, 121 S. Ct. 2264, 69 U.S.L.W. 3763 (2001) 16-18

Cole v. Oroville Union High School District, 228 F.3d 1092 (9th Cir. 2000), *cert. denied*, 121 S. Ct. 1228, 149 L. Ed. 2d 138 (2001) 6-7

Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756, 93 S. Ct. 2955 (1973) 51

Cases (Continued):

Cooper Industries Inc. v. Leatherman Tool Group Inc., 121 S. Ct. 1678, 149 L. Ed. 2d 674 (2001) 41-43

Davis v. DeKalb County School District, 233 F.3d 1367 (11th Cir. 2000), *cert. denied*, 121 S. Ct. 2217, 69 U.S.L.W. 3673 (2001) 18-19

Denno v. School Board of Volusia County, 218 F.3d 1267 (11th Cir.), *cert. denied*, 121 S. Ct. 382, 148 L. Ed. 2d 295 (2000) 34, 35

Downs v. Los Angeles Unified School District, 228 F.3d 1003 (9th Cir. 2000), *cert. denied*, 121 S. Ct. 1653, 149 L. Ed. 2d 636 (2001) 35

Eastern Associated Coal Corp. v. United Mine Workers of America, 531 U.S. 57, 121 S. Ct. 462 (2000) 38-39, 40

Edelman v. Lynchburg College, 228 F.3d 503 (4th Cir. 2000), *cert. granted*, 121 S. Ct. 2547, 69 U.S.L.W. 3481 (2001) 51-52

Falvo v. Owasso Independent School District No. I-011, 233 F.3d 1203 (10th Cir. 2000), *cert. granted*, 121 S. Ct. 2547, 69 U.S.L.W. 3481 (2001) 47

Ferguson v. City of Charleston, 121 S. Ct. 1281, 149 L. Ed. 2d 205 (2001) 36

Good News Club v. Milford Central School, 121 S. Ct. 2093, 154 Ed. L. Rep. 45 (2001) 1, 4-6, 30

Green Tree Financial Corp. v. Randolph, 531 U.S. 79, 121 S. Ct. 513 (2000) 39-40

Harper v. City of Chicago Heights, 223 F.3d 593 (7th Cir. 2000), *cert. denied*, 121 S. Ct. 883, 148 L. Ed. 2d 792 (2001) 12

Hollingsworth v. Lane Community College, 173 F.3d 860 (9th Cir. 1999), *cert. denied*, 121 S. Ct. 1401, 149 L. Ed. 2d 345 (2001) 34, 35

Cases (Continued):

Hopwood v. Texas (Hopwood I), 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996) 44-45

Hopwood v. Texas (Hopwood II), 236 F.3d 256 (5th Cir. 2000), *cert. denied*, 121 S. Ct 2550, 69 U.S.L.W. 3702 (2001) 44-45

Hunt v. Cromartie, 121 S. Ct. 1452, 149 L. Ed. 2d 430, *reh'g denied*, 121 S. Ct. 2239, 69 U.S.L.W. 3755 (2001) 1, 10, 11

Hunter ex rel. Brandt v. Regents of University of California, 190 F.3d 1061 (9th Cir. 1999), *cert. denied*, 531 U.S. 877, 121 S. Ct. 186 (2000) 43-44

In re Arons, 756 A.2d 867 (Del. 2000), *cert. denied*, 121 S. Ct. 2215, 69 U.S.L.W. 3269 (2001) 52

Jim C. v. United States, 235 F.3d 1079 (8th Cir. 2000), *cert. denied*, 121 S. Ct. 2591, 69 U.S.L.W. 3646 (2001) 24-25

Legal Services Corp. v. Velazquez, 531 U.S. 533, 121 S. Ct. 1043, *cert. denied*, 121 S. Ct. 1224, 149 L. Ed. 2d 135 (2001) 33-34

Lemon v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2105 (1971) 50

Lorillard Tobacco Co. v. Reilly, 121 S. Ct. 2404, 69 U.S.L.W. 4581 (2001) 30-31

Major League Baseball Players Ass'n v. Garvey, 121 S. Ct. 1724, 149 L. Ed. 2d 740 (2001) 37-38, 40

McCoy v. Chicago Heights, 6 F. Supp. 2d 973 (N.D. Ill. 1998), *aff'd in part, rev'd in part and remanded*, 223 F.3d 593 (7th Cir. 2000), *cert. denied*, 121 S. Ct. 1092, 148 L. Ed. 2d 966 (2001) 12

Mississippi University for Women v. Hogan, 458 U.S. 718, 102 S. Ct. 3331 (1982) 20

Cases (Continued):

Nguyen v. Immigration and Naturalization Service, 121 S. Ct. 2053, 1 Cal. Daily Op. Serv. 4754 (2001) 19-20

Olinger v. United States Golf Ass'n, 121 S. Ct. 2212, 69 U.S.L.W. 3751 (2001) 27

PGA Tour, Inc. v. Martin, 121 S. Ct. 1879, 149 L. Ed. 2d 904 (2001) 26-27

Regents of the University of California v. Bakke, 438 U.S. 265, 98 S. Ct. 2733 (1978) 44

Regents of the University of Minnesota v. Raygor, 620 N.W.2d 680 (Minn.), *cert. granted,* 121 S. Ct. 2214, 69 U.S.L.W. 3657 (2001) 49-50

Rice v. Sunrise Express, Inc., 209 F.3d 1008 (7th Cir.), *cert. denied*, 121 S. Ct. 567, 148 L. Ed. 2d 486 (2000) 41

Rogers v. New York University, 220 F.3d 73 (2d Cir.), *cert. denied*, 121 S. Ct. 626, 148 L. Ed. 2d 535 (2000) 30, 40-41

Rural West Tennessee African-American Affairs Council v. Sundquist, 209 F.3d 835 (6th Cir.), *cert. denied*, 121 S. Ct. 340, 148 L. Ed. 2d 273 (2000) 12

Rust v. Sullivan, 500 U.S. 173, 111 S. Ct. 1759 (1991) 34

Sante Fe Independent School District v. Doe, 530 U.S. 290, 120 S. Ct. 2266 (2000) 6, 7

Shaw v. Hunt (Shaw II), 517 U.S. 899, 116 S. Ct. 1894 (1996) 10

Shaw v. Reno (Shaw I), 509 U.S. 630, 113 S. Ct. 2816 (1993) 10

Sinkfield v. Kelley, 531 U.S. 28, 121 S. Ct. 446 (2000) 11

Cases (Continued):

Simmons-Harris v. Zelman, 234 F.3d 945 (6th Cir. 2000), *petition for cert. filed*, 70 U.S.L.W. 3035 (May 23, 2001) (No. 00-1751) 50-51

Smith v. University of Washington Law School, 233 F.3d 1188 (9th Cir. 2000), *cert. denied*, 121 S. Ct. 2192, 149 L. Ed. 2d 1024 (2001) 44, 45

United States v. Virginia, 518 U.S. 515, 116 S. Ct. 2264 (1996) 20

Urofsky v. Gilmore, 216 F.3d 401 (4th Cir. 2000), *cert. denied*, 121 S. Ct. 759, 148 L. Ed. 2d 662 (2001) 35

Varner v. Illinois State University, 226 F.3d 927 (7th Cir. 2000), *cert. denied*, 121 S. Ct. 2241, 69 U.S.L.W. 3557 (2001) 25

Vernonia School District 47J v. Acton, 515 U.S. 646, 115 S. Ct. 2386 (1995) 35

Virginia v. Reno, 121 S. Ct. 749, 148 L. Ed. 2d 653 (2001) 11-12

Williams v. Toyota Motor Manufacturing, Kentucky, Inc., 224 F.3d 840 (6th Cir. 2000), *cert. granted*, 121 S. Ct. 1600, 149 L. Ed. 2d 466 (2001) 47-48

Other Authorities:

28 U.S.C. § 1367 49

42 U.S.C. § 1983 15, 20-22, 34

Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* 49

Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* 22-30, 40, 47-48

Other Authorities (Continued):

Equal Pay Act of 1963, 29 U.S.C. § 206(d) 25

Fair Housing Amendments Act of 1988,
42 U.S.C. § 3601 *et seq.* 28

Family and Medical Leave Act of 1993,
29 U.S.C. § 1601 *et seq.* 41

Family Educational Rights and Privacy Act,
20 U.S.C. § 1232g 2-3, 47

Federal Arbitration Act, 9 U.S.C. § 1 37

Immigration and Nationality Act, 8 U.S.C. § 1409 19-20

Individuals with Disabilities Education Act,
20 U.S.C. § 1400 *et seq.* 52

Minnesota Human Rights Act, Minn. Stat. ch. 363 49

Section 504 of the Rehabilitation Act of 1973,
29 U.S.C. § 794 24-25

Title VI of the Civil Rights Act of 1964,
42 U.S.C. § 2000d *et seq.* 1, 13-15

Title VII of the Civil Rights Act of 1964,
42 U.S.C. § 2000e *et seq.* 15-20, 51-52

Voting Rights Act of 1965, 42 U.S.C. § 1971 *et seq.* 11-12

U.S. Const. amend. I 3-7, 21, 30-35, 50

U.S. Const. amend. IV 35-36

U.S. Const. amend. V 19

U.S. Const. amend. VII 42-43

U.S. Const. amend. VIII 42

U.S. Const. amend. XI 22-23, 25, 28, 49-50

U.S. Const. amend. XIV 8, 22, 42, 44

·NSBA·

SELECTED SCHOOL LAW CASES
JULY 2000 – JULY 2001

JULIE UNDERWOOD, GENERAL COUNSEL
JULIE LEWIS, STAFF ATTORNEY
THOMAS BURNS, LEGAL ASSISTANT
KAREN WALKING EAGLE, LEGAL INTERN

TABLE OF CONTENTS

PAGE

ATHLETICS

Brentwood Academy v. Tennessee Secondary School Athletic Association 1

DISCRIMINATION

Doe v. Dallas Independent School District 2
Hunter v. Regents of University 2
Belk v. Charlotte-Mecklenburg Board of Education 2
Yonkers Branch-NAACP v. City of Yonkers 3
Sinajini v. Board of Education of San Juan School District 3
Gruenke v. Seip 3
Downs v. Los Angeles Unified School District 3
Davis v. Dekalb County School District 4

GOVERNANCE

Harrisburg School District v. Hickok 5
McGraw v. Exeter Region Co-operative School District 5
Hardin County Schools v. Foster 5
Hallissey v. School Administrative District No. 77 5

LIABILITY

Shurm v. Kluck 7
Pearl Public School District v. Groner 7
Glaser v. Emporia Unified School District No. 253 7
Sain v. Cedar Rapids Community School District 8
Doe v. State 8
Campbell v. Burton 8

PROPERTY AND FACILITIES

Chiu v. Plano Independent School District 10

RELIGION

Cole v. Oroville Union High School District 11
Adler v. Duval County School Board 11
Campbell v. St. Tammany Parish School Board 12
Parker-Bigback v. St. Labre School 12
Altman v. Bedford Central School District 12
Freedom from Religion Foundation Inc. v. Bugher 12
Brown v. Gilmore 13

SCHOOL REFORMS

Simmons Harris v. Zelman 14
Utah School Boards Association v. Utah State Board of Education 14

SCHOOL SAFETY

Covington County v. G.W. 15
J.M. v. Webster County Board of Education 15
Grieb v. Unemployment Compensation Board of Review 15

SPECIAL EDUCATION

Walker County School District v. Bennett 16
Board of Education of Oak Park v. Nathan R. 16
Michael C. v. Radnor Township School District 16
Upper Arlington School District v. James 17
Birmingham v. Omaha School District 17
Hooks v. Clark County School District 17
K.D.M. ex rel. W.J.M. v. Reedsport School District 17
Padilla v. School District No. 1 in City and County of Denver 18
Jim C. v. U.S. 18
Fales v. Garst 18
Dale M. ex rel. Alice M. v. Board of Education of Bradley Bourbannais High School District No. 307 18
St. Johnsbury Academy v. D.H. 19
Woodside v. The School District of Philadelphia Board of Education 19
Somerville Board of Education v. Manville Board of Education 20
Williamson v. Keith 20

STUDENTS RIGHTS AND DISCIPLINE

Falvo v. Owasso Independent School District 21
C.H. v. Oliva 21
West v. Derby Unified School Dist. No. 260 22
Milligan v. City of Slidell 22
Neal ex rel. Neal v. Fulton County Board of Education 22
Seal v. Morgan 22
Moore v. Willis Independent School District 23
Castorina v. Madison County School Board 23
Earls v. Board of Education of Tecumseh Public School District 23
Wildman v. Marshalltown School District 24
Fuller v. Decatur Public School, Board of Education School District No. 61 24
LaVine v. Blaine School District 25
Neague v. Cynkar 25
Ream v. Centennial School District 26
Shoemaker v. State 26
In the Matter of L.A. 27
Busch v. Omaha Public School District 27
Commonwealth v. Buccella 27

ATHLETICS

Brentwood Academy v. Tennessee Secondary School Athletic Association,
180 F.3d 758 (6th Cir. 1994), *rev'd*, 531 U.S. 288 (2001)

The Supreme Court in a 5-4 decision ruled that because the Tennessee Secondary School Athletic Association (TSSAA) is overwhelmingly made up of public school officials who control its rulemaking and ministerial functions, the TSSAA is so entwined with the state as to make its actions indistinguishable from those of the state board of education, and therefore the TSSAA is a state actor that was subject to suit under either § 1983 or the Fourteenth Amendment. The TSSAA is a voluntary, nonprofit association that regulates interscholastic athletics in Tennessee for its members. Public schools make up 84 percent of its membership, and private schools comprise the remaining 16 percent. The TSSAA disciplined Brentwood Academy, a private school member, for violating a recruiting rule. Brentwood filed suit under § 1983, alleging the TSSAA violated the First and Fourteenth Amendments by enforcing the recruiting rule. The TSSAA countered that it was not subject to suit under either § 1983 or the Fourteenth Amendment because its conduct was private, not state, action.

DISCRIMINATION

Doe v. Dallas Independent School District, 220 F.3d 380 (5th Cir. 2000), *cert. denied*, 531 U.S. 1073 (2001)

The Supreme Court denied certiorari and refused to disturb a Fifth Circuit Court of Appeals decision that a school district was not liable under Title IX for a male teacher's sexual abuse of a male student. The appeals court held that the principal's response to the allegation that a male teacher sexually molested a male student did not amount to deliberate indifference, and that therefore the school district could not be held liable under Title IX for further alleged acts of sexual harassment of students. The appeals court said the principal interviewed the student and his mother, and then spoke with the teacher and warned him either that he would be "dealt with," if the accusations were founded, or that he should avoid acting in a way that could be misconstrued. Although the principal erroneously concluded that the student's allegation was not true, the appeals court could not say that her actions were an inadequate response to the student's allegation.

Hunter v. Regents of University of California, 190 F.3d 1061 (9th Cir. 1999), *cert. denied*, 531 U.S. 877 (2000)

The Supreme Court denied certiorari and refused to disturb a Ninth Circuit Court of Appeals decision that the admissions procedures of a laboratory elementary school run by a state university did not violate the equal protection clause. The appeals court affirmed a judgment against a student in her challenge to the school's admissions policy, which considered applicants' race and ethnicity. The appeals court held that the state's interest in operating a research-oriented elementary school dedicated to improving the quality of education in urban public schools was a compelling state interest. It determined that the use of race and ethnicity in the policy was narrowly tailored to serve the purposes of the state's interest, in view of evidence that it was necessary to achieve the precise student population required for valid and effective research. The appeals court rejected a dissenting judge's suggestion that the decision would permit the use of race as an admissions factor in "every stratum of a state's public education system."

Belk v. Charlotte-Mecklenburg Board of Education, 233 F.3d 232 (4th Cir. 2000) (Enbanc rehearing granted; opinion vacated Jan. 17, 2001)

The appeals court held that the Charlotte-Mecklenburg school district had not achieved unitary status in every respect, which was a requirement for fulfilling the task of desegregating the school system. The appeals court determined that the school district's actions in adopting an expanded magnet school program with race-conscious assignment policies could not be challenged as violating the equal protection clause. The court reasoned that the expanded magnet schools program, and the race-sensitive method of student selection it employed, did not violate the Constitution because the district undertook the method both to remedy the effects of past segregation and to comply with governing court orders.

Yonkers Branch–NAACP v. City of Yonkers, 251 F.3d 31 (2nd Cir. 2001)

The Second Circuit Court of Appeals upheld a federal district court's ruling that the state of New York must share certain costs incurred by the city of Yonkers in complying with a court-ordered desegregation plan in effect since 1985. In 1997, the district court, acting on the District Court's 1993 finding that the state shared responsibility with Yonkers for its segregated school system, ordered the state to share the cost of complying with the desegregation order. The district court, though, refused to give the state credit for payments it had made under certain statewide aid programs, such as a magnet school aid program and categorical grants, because those programs were not directly related to eliminating the vestiges of segregation in the Yonkers public schools. The appeals court agreed with the district court that Yonkers would have received the aid from the programs even in the absence of a court-ordered desegregation plan. As a result, the appeals court concluded that the aid was aimed at providing a general educational benefit, rather than complying with the specific court-ordered desegregation plan.

Sinajini v. Board of Education of San Juan School District, 233 F.3d 1236 (10th Cir. 2000), *cert. denied*, 121 S. Ct. 2521 (2000)

The Tenth Circuit Court of Appeals held that a federal district court, in a negotiated settlement, erred in limiting attorneys' fees to the issues pled, not those settled by negotiation, for plaintiffs who alleged that the San Juan School District had denied equal educational activities to Native Americans on the basis of race. The plaintiffs were parents and the Red Mesa and Oljato Chapters of the Navajo Tribe. The district court determined that the plaintiffs had prevailed only in part and therefore reduced the amount awarded to cover fees. The appeals court held that the district court erred in limiting the attorneys' fee award to the issues pled, because the court's judgment on the negotiated settlement was larger in scope than the pleadings had been. The appeals court said that viewing the action as a series of discrete claims was inappropriate when determining the prevailing party. It said the limitation was unreasonable because it belied the nature of the settlement process, wherein a party might prevail on claims that were previously stricken.

Gruenke v. Seip, 225 F.3d 290 (3rd Cir. 2000)

The Third Circuit Court of Appeals held that actions of a high school swimming coach violated the constitutional rights of a team member and her mother. The coach had requested that a team member he suspected was pregnant take a pregnancy test, failed to inform the member's mother of his suspicions, and aided and abetted others in allowing the topic to become a matter of gossip in the community. The court found that requiring the member to take the test constituted an unreasonable search in violation of the Fourth Amendment. It also found that the coach's actions resulted in a violation of the mother's due process right to direct the upbringing of her child. However, it found that the coach was protected by qualified immunity in the mother's § 1983 action, because the right in question had not been clearly established at the time in question.

Downs v. Los Angeles Unified School District, 228 F.3d 1003 (9th Cir. 2000), *cert. denied,* 121 S. Ct. 1653 (2001)

The Ninth Circuit Court of Appeals held that officials of a Los Angeles public high school, observing gay and lesbian awareness month with a bulletin board promoting tolerance for and appreciation of diversity, did not violate the First Amendment rights of a teacher who wanted to post a differing point of view. Because the bulletin board was fully controlled by school officials, the appeals court said, and thus constituted speech by the school district and the school board, the school officials could control the content of the billboard. It said neutrality was not required because the motivating force behind the awareness month was tolerance for and appreciation of diversity, and the materials the teacher sought to post harmed, rather than helped, that aim. The ruling allowed the officials to forbid the teacher to post the materials.

Davis v. Dekalb County School District, 233 F.3d 1367 (11th Cir. 2000), *cert. denied,* 121 S. Ct. 2217 (2001)

The Eleventh Circuit Court of Appeals affirmed the district court's ruling and held that the school district did not have the requisite notice to establish liability under section 1983. Three students had sued the school district, a principal, and a former teacher, alleging that the school's physical education teacher had perpetrated acts of sexual molestation. The appeals court said the student-plaintiffs had failed to produce any evidence that the defendants knew of or acted with deliberate indifference to the teacher's misconduct. Moreover, it said the plaintiffs never told their parents, legal guardians, or anyone at school what was happening while the events were occurring. The court said that another student's subsequent complaint about the teacher was insufficient to alert the school district to the possibility that the teacher was sexually molesting students.

GOVERNANCE

Harrisburg School District v. Hickok, 761 A.2d 1132 (Pa. 2000)

The Pennsylvania Supreme Court -held that the Reed Amendment, which exempts the school district in the Pennsylvania state capital from treatment mandated for other districts, was unconstitutional special legislation. The Reed Amendment is a part of the state Education Empowerment Act, which requires that school districts that have performed poorly be identified and assisted by the state department of education in improving their performance. This case challenged a part of the Reed Amendment that singled out the schools in Harrisburg for special treatment. The court determined that there was no rational basis for treating the school district of the capital differently from other school districts with failed educational systems. It cited a U.S. Supreme Court ruling that a classification was per se unconstitutional when the class consisted of one member and it was impossible or highly unlikely that another could join the class.

McGraw v. Exeter Region Co-operative School District, 765 A.2d 710 (N.H. 2001)

The New Hampshire Supreme Court held that a change in state statute reducing to three-fifths the majority needed to authorize the issuance of bonds or notes in all voting districts at all levels in the state did not violate the state constitution. School district voters in the state had approved a bond issue for renovation of a high school by a 60.8 percent majority. Subsequently, a resident asked the court for a declaratory judgment against the three-fifths requirement, saying it violated the equal protection clause. The court held that the statute did not violate a provision of the state constitution requiring a referendum to change the charter or form of government of a particular city or town. It also held that voters in communities or school districts operating under distinctly different forms of government were not similarly situated, and thus there was no equal protection violation.

Hardin County Schools v. Foster, 40 S.W.3d 865 (Ky. 2001)

The Kentucky Supreme Court ruled that student disciplinary records, with all information identifying individual students removed, were subject to disclosure under state law. Kyle Foster, a newspaper reporter, had made an open records request to Hardin County schools to inspect and make copies of student disciplinary records. Hardin County denied the request on grounds that the records were exempt from disclosure under Kentucky's Open Records Act because they were an "educational record" within the meaning of the Family Educational Rights and Privacy Act (FERPA). The state Supreme Court said the records were not an "educational record" as defined by FERPA, provided that the county redacted all personal information that would identify individual students. Shorn of that information, it said, the records were in the nature of a statistical compilation subject to disclosure.

Hallissey v. School Administrative District No. 77, 755 A.2d 1068 (Maine 2000)

The Maine Supreme Court ruled that the Maine statute's requirement that students "reside" within a school district means that a student must actually live there, with the exception of a secondary student whose parents reside in a school administrative unit that neither maintains a secondary school nor contracts for secondary school privileges. That student may attend a private school approved for tuition purposes, and the school unit where the student's parents reside must pay tuition. The court also ruled against a parent who cited the state statute allowing a student who temporarily resides in a school unit and who is living with a parent who moves from place to place because of employment to be considered a resident of that unit. In this case, the court found the law not applicable to a parent who moved out of the district to attend law school and then sought a tuition subsidy to defray the cost of her child's tuition at a private school.

LIABILITY

Shurm v. Kluck, 249 F. 3d 773 (8th Cir. 2001)

The Eighth Circuit Court of Appeals ruled that the Elwood School District was not liable under either § 1983 or Title IX for failing to inform another school district of sexual misconduct allegations against a prospective employee while he was employed by Elwood, or for sexual molestation by the former employee after he was hired by the other school district. During his tenure as a teacher and coach in the Elwood School District, Michael Kluck was investigated twice for alleged sexual assaults on students. After Elwood decided to terminate Kluck, it entered into a confidential settlement agreement with him, stipulating that Kluck would voluntarily resign, all references in his personnel files to the investigation would be removed, the school district would provide him with a positive letter of recommendation, and all future references would be consistent with the recommendation. When he interviewed with LaPorte School District, Elwood honored its agreement. LaPorte hired Kluck to coach and teach at its junior high school. He was subsequently charged with and pleaded guilty to sexually molesting a male student. The student's mother, Kimberly Shurm, filed suit against Elwood. On her § 1983 claim, the court said Shurm could establish liability only if Elwood's actions in providing a positive recommendation and withholding information on the investigations constituted executive action that "shocks the conscience." It concluded that Elwood's actions did not "shock the conscience" because Kluck's subsequent sexual misconduct was not so obvious a consequence as to impute § 1983 liability to Elwood based on its deliberate indifference to that consequence. The panel dismissed the Title IX claim because Kluck was no longer employed by Elwood at the time the sexual assault occurred, and therefore Elwood no longer had any control over his conduct..

Pearl Public School District v. Groner, 784 So. 2d 911 (Miss. 2001)

The Mississippi Supreme Court ruled that before a school district can be entitled to immunity under the state tort claims law, it must show that it exercised ordinary care to provide a safe environment for students. Rita Groner, an adult supporter of Pearl High School extracurricular activities, was injured at a school basketball game when a fight broke out. A security plan that the school was required to file with the Mississippi High School Activities Association mandated two security guards on duty, but only one guard was on duty at the game. Mrs. Groner filed a negligence suit against Pearl school district and was awarded $45,000 in damages by the trial court. The school district contended that it was immune from liability under the Mississippi Tort Claims Act. The state Supreme Court told the trial court to determine from the evidence whether the school district in this case had, in fact, exercised ordinary care when it provided security at the basketball game.

Glaser v. Emporia Unified School District No. 253, 21 P.3d 573 (Kan. 2001)

The Kansas Supreme Court ruled that a school had no duty to supervise or protect a student who was not in the school building and therefore was not in the school's custody or under its control, and that the school district had not assumed a duty based on affirmative acts or a promise to supervise or protect students who were not in the school's custody or under its control. Todd Glaser, a seventh grade student at Lowther Middle School, was struck and injured by a car when he ran off school grounds and onto a public street while being chased by another student. The accident occurred before the beginning of the school day. Todd sued the school district for negligent failure to supervise students who are on school property before the beginning of the school day. The Kansas Supreme Court ruled that the school district was not liable for Todd's injuries.

Sain v. Cedar Rapids Community School District, 626 N.W. 2d 115 (Iowa 2001)

The Iowa Supreme Court ruled that a school district can be held liable for educational malpractice if a school counselor has given false information that harms a student's future education. Bruce Sain, a senior at Jefferson High School in Cedar Rapids, was a Division I university basketball prospect. He had accepted an athletic scholarship to Northern Illinois University that was contingent on his satisfying all of the National Collegiate Athletic Association's (NCAA's) core course requirements for eligibility. Sain was registered to take "English Literature," a course that would satisfy the NCAA's core English requirements. He was dissatisfied with the course, though, and asked his guidance counselor, Larry Bowen, if there was another course he could take that would satisfy the NCAA requirements. Bowen recommended the "Technical Communications" course. But because the school had failed to include the "Technical Communications" course on the list of classes it submitted to the NCAA for approval, the NCAA ruled that Sain had not satisfied its core English course requirements and was ineligible to compete in basketball. After the NCAA denied his request for a waiver, Northern Illinois revoked his scholarship. Sain sued Cedar Rapids School District, alleging educational malpractice. The Iowa Supreme Court ruled that Sain had stated a claim for educational malpractice based on negligent misrepresentation made by the guidance counselor. The court found that Mr. Bowen is in the business of supplying information to students who are relying on his knowledge and expertise in the same way a client relies on an attorney's knowledge when he gets legal advice or a patient relies on her doctor's expertise when she gets a medical diagnosis.

Doe v. State, 24 P.3d 1269 (Ariz. 2001)

The Arizona Supreme Court ruled that a plaintiff had cause for action against the state of Arizona based on the state's failure to adequately investigate a teacher's background before it issued him a teaching license, and that state immunity law did not grant the state absolute immunity because the law applied only to fundamental policy determinations, not to the granting or revoking of particular licenses. Kenneth Graham, a teacher in the Gilbert Unified School District, repeatedly sexually molested a student, referred to as John Doe. John's mother filed suit against the school district and the state of Arizona. She claimed that in processing and approving Graham's application for a teaching certification, the state was negligent because it failed to discover a previous criminal conviction involving conduct of a sexual nature. The state contended that it was entitled to absolute immunity.

Campbell v. Burton, 750 N.E. 2d 530 (Ohio 2001)

The Ohio Supreme Court ruled that a school district and the superintendent could be held liable for failing to report suspected sexual abuse because state law imposed an affirmative duty on political subdivisions and their employees to report child abuse. Amber Campbell, a junior high school student in Fairborn City, Ohio, informed Debra Mallonee, a teacher and peer mediation coordinator, that a family friend, David Burton, had been touching her in an inappropriate manner. Although Mallonee instructed Amber to tell her mother and to stay away from Burton, she did not report the alleged sexual abuse to anyone. Amber claimed that Burton continued to sexually abuse her after her conversation with Mallonee. A year later, Amber's parents filed suit against the school district and the superintendent, and a separate suit against Mallonee. The parents alleged that as a result of the defendants' failure to report the suspected child abuse in violation of state law, Amber suffered psychological and other permanent injuries. The court rejected the defendants' contention that they were entitled to sovereign immunity because the language in the state law did not expressly impose liability on political subdivisions and its employees for failing to report suspected abuse. It concluded that the fact that the law imposed a criminal penalty on violators demonstrated the state legislature's intent to impose civil liability as clearly as it would have if the legislature had included the word "liability" in the law's language.

PROPERTY AND FACILITIES

Chiu v. Plano Independent School District, 260 F.3d 330 (5th Cir. 2001)

The Fifth Circuit Court of Appeals ruled that the Plano Independent School District infringed the free speech rights of a group of parents by refusing to let them pass out materials or obtain signatures on school grounds in their effort to halt the implementation of a math program. The appeals court said, though, that a school official's refusal to let the parents use the school district mail system to distribute their flyers was not viewpoint discrimination, as the parents had alleged, but a reasonable attempt to enforce the school district's policy of limiting use of the mail system to groups providing programming or services for the students. The group of parents attended school math nights at which they attempted to pass out materials critical of the math program and obtain signatures for their petition to halt implementation of the program. On each occasion they were prevented from engaging in these efforts on school grounds. They then asked an associate superintendent for permission to distribute a flyer to each student in the district through the school district mail system. The request was denied, and the flyers were sent via U.S. mail. The parents filed suit against the school district, alleging that Plano had violated their free speech rights. The appeals court said that regardless of whether the math night venues were public forums, limited public forums, or non-public forums, the parents had a valid claim that their free speech rights were infringed upon by the district's refusal to allow them to distribute materials critical of the math program because they had alleged facts sufficient to show that the school district had engaged in viewpoint discrimination. On the internal mail question, the appeals court concluded that the school district's internal mail system was a non-public forum because there was no evidence that Plano intended the mail system to "facilitate debate on issues of public concern." The court pointed out that even in a non-public forum the parents would still have a valid free speech claim if the school official's denial of the request had been based on viewpoint discrimination, but it was not.

RELIGION

Cole v. Oroville Union High School District, 228 F.3d 1092 (9th Cir.), *cert. denied*, 121 S. Ct. 1228 (2001)

The Supreme Court denied certiorari, letting stand an appeals court decision upholding a principal's action prohibiting two students from giving prepared speeches that he deemed to be proselytizing and sectarian. The appeals court said that to allow the speeches would have constituted endorsement of religious speech by the school district. The principal of Oroville High School in California prohibited the two students from giving prepared speeches at the school's graduation ceremony, acting pursuant to school district policy that required principals to review in advance all student speeches to be given at graduation ceremonies. The Circuit Court of Appeals upheld the principal's action.

Adler v. Duval County School Board, 206 F.3d 1070 (11th Cir.), *cert. granted and vacated by*, 531 U.S. 801 (2000), *remanded to*, 250 F.3d 1330 (11th Cir. 2001)

The Supreme Court, granting certiorari, vacated an Eleventh Circuit Court of Appeals decision that a school system's policy of permitting students to vote on whether to have unrestricted student-led messages at the beginning or closing of a high school graduation ceremony did not violate the establishment clause. The petition for certiorari posed the question whether the religion clauses of the First Amendment are violated by a public school district policy permitting student-led prayer at high school graduation exercises, pursuant to the results of student referenda. The Supreme Court also remanded the case to the Eleventh Circuit for further consideration in light of Santa Fe Independent School Dist. v. Doe (120 S.Ct. 2266 (U.S. 2000), in which the Supreme Court held that a school district's policy that permitted prayer initiated and led by a student over a school's public address system before all home football games violated the establishment clause.

The Duval County School Board had adopted a policy allowing the graduating high school class to elect a member of the class to deliver a speech during graduation ceremonies. School officials exercise no control over the election or the content of the speech. Several students filed suit, alleging that the policy violated the establishment clause. Although a federal appeals court initially ruled that the policy did not violate the establishment clause, that decision was vacated after the U.S. Supreme Court ruled in the Santa Fe case that a school board's policy permitting students to vote on delivery of a "statement or invocation" at football games violated the establishment clause. After reconsidering Duval County's policy in light of the Supreme Court's ruling in Santa Fe, the appeals court again ruled the policy did not violate the establishment clause. The appeals court found that there were crucial differences between the policies of Santa Fe and Duval. Specifically, it said, the Santa Fe school board retained control over the content of the speech, while Duval exercised no such control. As a result, it agreed that Santa Fe's policy constituted state-sponsored speech rather than private speech, but under the Duval policy, the control over content of the speech was left to the student speaker. Referring to the Santa Fe school district's long tradition of public prayer before football games, the appeals court also noted that unlike the Santa Fe policy, the Duval policy did not, "by its terms, invite and encourage religious messages."

Campbell v. St. Tammany Parish School Board, 206 F.3d 482 (5th Cir.), *reh'q enbanc denied*, 231 F. 3d 937 (5th Cir. 2000), *cert. granted and vacated by*, 121 S. Ct. 2518 (2001)

The Supreme Court vacated the judgment of the Fifth Circuit Court of Appeals that the Tammany Parish School Board's policy excluding religious clubs from school facilities did not violate the First Amendment's free speech clause. The case involved a religious club using a public school's facilities after hours. The Supreme Court acted on the Fifth Circuit case after it ruled in Good News Club v. Milford Central School that a religious club could meet after hours in a public school because the school had opened its doors to other clubs, such as the Boy Scouts and the 4-H Club. The circuit court had concluded that the Tammany Parish policy, which prohibited religious services or religious instruction on school premises, was not viewpoint discrimination because it did not bar expression of religious viewpoints, and that the policy created by the school board successfully balanced both free speech and establishment clause concerns.

Parker-Bigback v. St. Labre School, 7 P.3d 361 (Mont. 2000), *cert. denied*, 531 U.S. 1076 (2001)

The Supreme Court denied certiorari and let stand a Montana Supreme Court decision that a school counselor who claimed she was terminated by a Catholic school because she was cohabiting with a man to whom she was not married had failed to establish a case of discriminatory termination. The woman had brought suit against the Catholic school to recover damages arising out of her alleged discriminatory termination. The Montana Supreme Court determined that the school counselor's alleged conduct did not involve a right of such high order that it would overcome the school's right to freely exercise its religion through its employment practices as guaranteed by the First Amendment. Thus, in considering the counselor's claim that she was discriminatorily terminated, the Montana Supreme Court saw no need to balance those religious rights upon which the state district court based its decision against the counselor's right to be free from discrimination based on marital status or her gender.

Altman v. Bedford Central School District, 245 F.3d 49 (2nd Cir. 2001)

The Second Circuit Court of Appeals dismissed a federal district court finding that Bedford Central School District activities that involved teaching about Ganesha, a Hindu god; making worry dolls; celebrating Earth Day (except at the high school); and listening to a nature tape violated the students' First Amendment rights under the establishment and free exercise clauses. Parents of several elementary, middle, and high school students in the school district had filed suit challenging these activities at the schools. The district court had agreed with the parents. The appeals court ruled that the school district's activities did not violate either the establishment or free exercise clause. It found that a reasonable person observing the Earth Day ceremonies would not view the ceremonies as endorsing religion. The court also concluded that the voluntary nature of participation in the Earth Day celebration precluded it from finding that the ceremonies burdened any student's ability to freely exercise his or her religious beliefs.

Freedom from Religion Foundation Inc. v. Bugher, 249 F.3d 606 (7th Cir. 2001)

The Seventh Circuit Court of Appeals ruled that a portion of a Wisconsin law providing state funds directly to religious schools violated the establishment clause of the First Amendment. The Wisconsin law provided public and private schools, including those with religious affiliations, with low-cost Internet data lines and video links. Schools were able to either purchase access to the lines or links directly from the state at a subsidized cost, or request a grant of state funds to offset the cost of existing lines or links they were receiving from a commercial provider. A group of taxpayers represented by the Freedom from Religion Foundation filed suit against the state, claiming that the law violated the establishment clause The appeals court only addressed the issue of whether the cash grants were unconstitutional. The court reasoned that because there were no restrictions requiring that the funds be used only for secular purposes, the portion of law providing cash grants directly to religious schools had the primary effect of advancing religion.

Brown v. Gilmore, 258 F.3d 265 (4th Cir. 2001), *petition for cert. filed*, 70 U.S.L.W. 3164 (August 31, 2001) (No. 01-384)

The Fourth Circuit Court of Appeals ruled that a law enacted in 2000 by Virginia, requiring all public schools in the state to observe a minute of silence in classrooms, does not advance religion and thus is not in violation of the establishment clause of the First Amendment. The Virginia law requires a minute of silence during which "each pupil may, in the exercise of his or her individual choice, meditate, pray, or engage in any other silent activity which does not interfere with, distract, or impede other pupils in the like exercise of individual choice." Several students mounted a legal challenge to the mandatory minute of silence, arguing that the law violates the establishment clause because the minute of silence is in effect school-sponsored prayer. The appeals court rejected the students' argument, ruling that prayer was just one of many options, some secular and some religious, that students could avail themselves of during the minute. As a result, it found that the law as written did not advance religion. The court concluded that the law had the secular purpose of allowing students time to reflect, meditate or pray, as was their choice, at the beginning of the school day. It also found that the law did not have the primary effect of advancing or inhibiting religion because the prayer was just one of many options that students can choose to exercise during the minute of silence. The court concluded that the law as written avoided excessive entanglement between government and religion because teachers' sole duty under the law is to observe and enforce the period of silence during which students exercise their options.

SCHOOL REFORM/VOUCHERS

Simmons Harris v. Zelman, 234 F.3d 945 (6th Cir. 2000), *petition for cert. filed,* 70 U.S.L.W. 3035 (May 23, 2001) (No. 00-1751)

The Sixth Circuit Court of Appeals held that Ohio's school voucher program violated the establishment clause of the First Amendment. Despite the element of parental choice, it found that the program provided financial assistance only for those parents who wished to place their children in the particular private schools, mostly religious, that took part in the program.. The law establishing the program was enacted in 1995 in response to an order by a federal district court that placed the Cleveland School District under the direct management and supervision of the state superintendent of public instruction because of mismanagement by the local school board. The voucher program covers any state school district that has been the subject of a federal court order "requiring supervision and operational management of the district by the state superintendent." It provides scholarships to children residing within the applicable district in kindergarten through eighth grade. The program gives preference to students from low-income families. According to the law, scholarships may be awarded to students who are not from low-income families only if all students from low-income families have been given first consideration for placement. The voucher program pays scholarships according to family income. It requires participating private schools to cap tuition at $2,500 per student per year and pays 90 percent of whatever tuition the school actually charges for low-income families; for other families, the state pays 75 percent of the school's tuition up to a maximum of $1,875. Each scholarship for children attending a private school is payable to the parents of the student entitled to the scholarship. Scholarship checks are mailed to the school selected by the parents, where the parents are required to endorse the checks over to the school in order to pay tuition. The court noted that "the alleged choice afforded both public and private school participants in this program is illusory in that the program's design does not result in the participation of the adjacent public schools from outside the Cleveland school district."

Utah School Boards Association v. Utah State Board of Education, 17 P.3d 1125 (Utah 2001)

The Utah Supreme Court held that the control and supervisory powers granted to the State Board of Education by the state's 1998 Charter Schools Act did not violate the state constitution. The Utah Legislature passed the act as part of the Schools for the 21st Century initiative to address the individual needs of Utah students. The act authorized the creation of "up to eight charter schools [in Utah] for a three-year pilot program." It authorized the State Board of Education to act in a supervisory role with the authority to review charter school applications and either approve or deny each one.

SCHOOL SAFETY

Covington County v. G.W., 767 So.2d 187 (Miss. 2000)

School officials were not required to obtain a warrant before searching a high school student's truck in the school parking lot. The principal was informed that the student had been drinking in the parking lot, and other students corroborated that story. The principal and school security officer saw empty beer cans in the back of the truck.

J.M. v. Webster County Board of Education, 534 S.E.2d 50 (W.Va. 2000)

A hearing on whether to suspend a high school student for possession of a gun in violation of the Safe Schools Act was not procedurally deficient. The student alleged there was no evidence that his father received notice of the informal hearing. However, his mother was notified and present, and the record suggested that his father was aware of the proceedings as well.

Grieb v. Unemployment Compensation Board of Review, 767 A.2d 1138 (Pa. Cmwlth. 2001)

Karen Grieb, a teacher at the State College Area School District, was suspended without pay for bringing three shotguns onto school property. The Unemployment Compensation Board of Review determined that Grieb committed willful misconduct when she drove her car onto school property and denied unemployment benefits. Grieb petitioned for review of the decision claiming that the guns were in her car because she was in the process of moving. The teacher felt she was entitled to unemployment benefits. The court held that the teacher violated the school district's weapons policy by parking a vehicle that contained visible shotguns on school property. The court also found that the teacher's explanation that she forgot the shotguns were in her vehicle when she drove to work and parked on school property did not establish good cause for violation of the district's weapons policy so as to entitle the teacher to unemployment benefits. The employer's policy, of which the claimant was aware, prohibits possessions of weapons and replicas of weapons in any school district building or on school property.

SPECIAL EDUCATION

Walker County School District v. Bennett, 203 F.3d 1293 (11th Cir.), *cert. denied,* 531 U.S. 1059 (2000)

The Supreme Court denied certiorari in a case in which both a federal district court and the Eleventh Circuit Court of Appeals found that the Walker County School District was required to reimburse the parents of an autistic child for the costs of educating the child at a private school one year after the parents rejected the school district's plan for educating her. The child, Jensine Bennett, was identified as an autistic child in 1991, when she was three. In 1995, Jensine's parents rejected the school district's proposed Individual Education Plan (IEP) and placed her in private school. In 1996, they filed suit seeking reimbursement of the costs of private schooling. In the district court, the school district moved for an evidentiary hearing to present "additional evidence." The district court rejected the motion. On appeal, the Eleventh Circuit ruled that the district court acted within its discretion in refusing to receive and consider evidence that the school district wished to offer in addition to the record of the administrative proceedings. On the merits, the Eleventh Circuit concluded that the district court did not err in its decision that the school district was required to reimburse the Bennetts for the costs of educating Jensine at the private school during the 1995-96 school year.

Board of Education of Oak Park v. Nathan R., 199 F.3d 377 (7th Cir.), *cert. denied,* 531 U.S. 822 (2000)

The Supreme Court denied certiorari and declined to hear arguments in a Seventh Circuit Court of Appeals case holding that the parents of a disabled student were not prevailing parties entitled to attorneys' fees under the Individuals with Disabilities Education Act (IDEA). The parents, who claimed in their action that a school district was required to provide the student with special education services during his expulsion, obtained an emergency order of stay-put placement under which the student stayed in school until he graduated, without expulsion. The Seventh Circuit held, however, that this result was only interim in nature and did not rise to the level of an enforceable judgment, consent decree, or settlement that materially altered the parties' relationship.

Michael C. v. Radnor Township School District, 202 F.3d 642 (3rd Cir.), *cert. denied,* 531 U.S. 813 (2000)

The Supreme Court denied certiorari and left undisturbed a Third Circuit Court of Appeals decision that when a father unilaterally removed his disabled child from a private school for disabled children upon moving to another state, the school district in the second state was not required by the "pendency" or "stay-put" provision of IDEA to place the child in a private, segregated school, absent an agreement of the father and the school authorities in the second state to do so. The appeals court had found that neither Pennsylvania's special education standards nor the constitutional right to travel required a different result.

Upper Arlington School District v. James, 228 F.3d 764 (6th Cir.), *cert denied,* 121 S. Ct. 1655 (2001)

The Supreme Court denied certiorari in a Sixth Circuit Court of Appeals case holding that the parents of a special education student were entitled to reimbursement for private school tuition for their child, even though IDEA did not specifically mandate it. The appeals court had held that the Jameses, parents of a special education student, had a claim under IDEA for reimbursement of the cost of private school tuition based on the parents' request that the school district develop an IEP for their son, who at the time was not enrolled in a public school within the district. The appeals court said that even though there was no clear language in the text of IDEA mandating that school districts have an obligation to develop an IEP before the student's enrollment in public school, the school district's obligation to special education students derived "from residence in the district, not from enrollment."

Birmingham v. Omaha School District, 220 F.3d 850 (8th Cir. 2000)

The Eighth Circuit Court of Appeals ruled that the three-year limitations period contained in Arkansas's general personal injury statute, rather than the 30-day limitations period of the Arkansas Administrative Procedure Act (AAPA), applied to an action under the IDEA. The court found that the AAPA is not closely analogous to the IDEA and that, in any event, the 30-day period violates IDEA's policies of protecting the opportunity to receive a free appropriate public education and encouraging parents and school officials to resolve disputes over the disabled child's education.

Hooks v. Clark County School District, 228 F.3d 1036 (9th Cir. 2000), *cert. denied,* 121 S. Ct. 1602 (2001)

The Court of Appeals for the Ninth Circuit found that IDEA gives states discretion to determine whether home education that is exempted from a state's compulsory attendance requirement qualifies as a "private school" for purposes of meeting the IDEA requirements. Thus, it ruled, under a former Nevada statute, a home-educated student was not entitled to state-funded speech therapy services. Moreover, it found that a school district's policy to refuse coverage of such services to home-educated students did not violate the due process or equal protection clauses.

K.D.M. ex rel. W.J.M. v. Reedsport School District, 196 F.3d 1046 (9th Cir.1999), *reh'q enbanc denied*, 210 F.3d 1098 (9th Cir.) and *cert. denied*, 531 U.S. 1010 (2000)

The Supreme Court denied certiorari and let stand a Ninth Circuit Court of Appeals decision holding that an Oregon regulation permitting special education and related services to be offered to private school students only in a religiously neutral setting did not violate the First Amendment. In this case, a disabled student who attended parochial school brought suit challenging the school district's refusal to provide a vision specialist at his school. The appeals court held that IDEA did not require the school district to provide special education and related services on the site of a private school, and that the Oregon regulation did not impose an impermissible burden on the free exercise of religion. It found that the regulation did not violate the establishment clause or the equal protection clause. The appeals court found that the regulation had a rational basis, because the state of Oregon had a legitimate interest in its interpretation of its constitutional requirement to separate church and state.

Padilla v. School District No. 1 in City and County of Denver, 233 F.3d 1268 (10th Cir. 2000)

The Tenth Circuit Court of Appeals held that IDEA provides a comprehensive enforcement scheme that precludes a § 1983 suit as a remedy for IDEA violations. A student with physical and developmental disabilities, through her legal guardian, had sued the school district, the board of education, and individual district employees, alleging violations of her rights under the Americans with Disabilities Act (ADA) and the IDEA. The appeals court also held that the student was not required to exhaust all remedies under IDEA before pursuing a claim under the ADA. The court recognized a split among the Circuits on this issue.

Jim C. v. U.S., 235 F.3d 1079 (8th Cir. 2000), *cert. denied*, 121 S. Ct. 2591 (2001)

The Supreme Court declined to review a ruling by the Eighth Circuit Court of Appeals that Congress had abrogated states' Eleventh Amendment sovereign immunity from suits brought under § 504 of the Rehabilitation Act of 1973. The case involved a suit brought by the parents of an autistic student against the Arkansas Department of Education. They alleged that the department had failed to comply with certain statutory obligations under § 504. The state asserted that it was entitled to sovereign immunity from the suit under the Eleventh Amendment. The appeals court ruled that § 504 was a valid exercise of Congress's power under the Constitution's spending clause. As a result, the court concluded that Arkansas had waived its sovereign immunity with respect to § 504 when it accepted federal funds.

Fales v. Garst, 235 F.3d 1122 (8th Cir. 2001)

The Eighth Circuit Court of Appeals found that the needs of a principal to administer the school effectively took precedence over the rights of three middle school teachers to speak out about their concerns for the treatment of special education students. The teachers filed suit against the principal (Garst), alleging violation of their rights to equal protection and free speech. The suit arose out of disagreement over the needs of special education students. Over a period of four years, tensions had grown between Garst and the three teachers. As a result, the teachers complained about Garst's administrative decisions and actions to his superiors and others, including the media. In this suit, the plaintiffs alleged that Garst had violated their First Amendment rights to freedom of speech and association by instructing them not to discuss incidents relating to special education students at the school, and their Fourteenth Amendment rights to equal protection by lowering their evaluations. The appeals court held that the teachers failed to state an equal protection claim, absent specific evidence of incidents in which they were treated differently from others who were similarly situated. It held that the teachers' concerns about proper care and education of special education students were outweighed by the principal's interest in efficiently administering the school. The court concluded that the undisputed facts show that the plaintiffs' speech resulted in school factions and disharmony among their co-workers and negatively affected Garst's interest in efficiently administering the middle school.

Dale M. ex rel. Alice M. v. Board of Education of Bradley Bourbonnais High School District No. 307, 237 F.3d 813 (7th Cir. 2001)

The Seventh Circuit Court of Appeals held that the Bradley Bourbonnais High School District's obligation to provide a disabled student with a free appropriate education did not extend to reimbursement for a placement that was essentially custodial in nature. The mother of the student, Dale M., brought an administrative proceeding under the IDEA, seeking to compel the school district, which is in, to reimburse her for costs of placing her disabled son in a boarding school. Dale had been a serious disciplinary problem for some time before he was placed in a therapeutic day school, and he eventually ended up in jail after he was charged with residential burglary. A psychologist who examined Dale determined that he did not have a learning disability but instead a "conduct disorder," along with depression and substance abuse. After his release from jail, the school district wanted to send Dale back to the therapeutic day school. Instead, his mother obtained Dale's release from jail and placed him in a residential school, the Elan School, in Maine. She demanded that the school district pay for Dale's attending Elan, because, otherwise, he would not be getting the free appropriate public education to which he was entitled. The school district refused.

St. Johnsbury Academy v. D.H., 240 F.3d 163 (2nd. Cir. 2001)

The Second Circuit Court of Appeals held that neither IDEA nor the Rehabilitation Act required that a private high school accept a disabled student who did not meet the school's academic requirements, even though the student had been referred by a public school district because it lacked a high school of its own. The school district, in Vermont, had placed the disabled student in the private St. Johnsbury Academy. The student, who wanted to enter the ninth grade, contested the academy's requirement that students perform at a fifth grade level as a condition of placement in mainstream high school academic classes. A state administrative hearing officer ruled in the student's favor, citing requirements under IDEA and the Rehabilitation Act. The academy sought review, and the case eventually went up to the appeals court. The appeals court held that IDEA coverage generally extends to a disabled student's 22nd birthday. The court also held, though, that a private high school's performance requirement could not violate IDEA because the school was not directly subject to IDEA's standards, and that the student did not make a valid claim under the Rehabilitation Act. The court reasoned that St. Johnsbury Academy is not required to accept students from the St. Johnsbury School District. It said students in the district had the option of attending other high schools outside the district.

Woodside v. The School District of Philadelphia Board of Education, 248 F.3d 129 (3rd Cir. 2001)

The Third Circuit Court of Appeals ruled that an attorney-parent who represents his or her child in administrative hearings under IDEA is not entitled to attorneys' fees. The parents of Henry Woodside, a special education student, had objected to the level of services being provided to their son by the Philadelphia school district. They requested a due process hearing, during which Henry's father, attorney J. Stephen Woodside, represented Henry. After the school district was ordered to provide the services requested by the Woodsides, Mr. Woodside sought to recover attorneys' fees for his legal services. The appeals court reasoned that the purpose of IDEA's attorneys' fees provision was to serve as an incentive for the prosecution of meritorious claims by encouraging plaintiffs to retain emotionally detached, independent counsel. "Because the policy behind the IDEA's fee-shifting provision is to encourage the effective prosecution of meritorious claims," the court said, "… the better rule is one which encourages parents to seek independent, emotionally detached counsel for their children's IDEA actions…."

Somerville Board of Education v. Manville Board of Education, 768 A.2d 779 (N.J. 2001)

The Massachusetts Supreme Court ruled, in a case brought by the parents of a special education student who had a joint custody agreement but lived in different school districts, that both school districts should be considered the student's domicile for purposes of participating in providing special education services, including sharing the costs of such education. When the parents of the student, A.P., divorced, they were awarded joint legal and physical custody. The parents agreed to exercise physical custody on alternating weeks. The father continued to live in the Somerville school district, while the mother moved to the Manville school district. Somerville had developed an IEP that placed A.P. in Midland School. Before A.P.'s enrollment at Midland, Somerville and Manville agreed to share the tuition costs on an alternating-year basis. After the agreement had been in place for four years, the new director of special services at Manville decided that the school district would no longer share the tuition costs because A.P. was not domiciled in Manville. The court also found nothing inconsistent in either IDEA or the New Jersey Administrative Code with representatives from both districts participating in developing and reviewing A.P.'s IEP.

Williamson v. Keith, 786 So.2d 390 (Miss. 2001)

The Mississippi Supreme Court dismissed a parent's claims against the school district's attorney for abuse of process, invasion of privacy, and violation of her daughter's rights to due process. Kelli Williamson, a hearing impaired student, was receiving special education services from Madison County school district. Somewhere between school and home, Kelli lost the magnet, coil, and cord components of her cochlear implant. Her mother, Cynthia Williamson, demanded reimbursement for the lost components on the grounds that the implant was an assistive technology device within the meaning of IDEA. The school district refused because it viewed the implant as a personal device, not an assistive technology device. In anticipation of the due process hearing requested by the mother, the school district's attorney subpoenaed Kelli's medical records from the clinic that had performed the implant procedure. The reimbursement dispute was settled without a due process hearing, but when the mother learned that the attorney had subpoenaed Kelli's medical records, she sued. The trial court said the mother could not claim violation of due process because the attorney is a private citizen. The state supreme court found both the abuse of process and invasion of privacy claims without merit. The court said the evidence failed to show that the attorney had acted with an ulterior motive when he failed to provide a copy of the subpoena to Mrs. Williamson or her attorney, and it found no evidence that the school attorney's action had resulted in damage to Mrs. Williamson. The court found that there was no public disclosure of private facts; it said the attorney's disclosure of Kelli's medical files was limited to his legal assistant and the school district's special education director, and Kelli's medical files had been published at a previous due process hearing.

STUDENT RIGHTS AND DISCIPLINE

Falvo v. Owasso Independent School District, 233 F.3d 1203 (10th Cir. 2000), 121 S. Ct. 2547 (2001)

The Supreme Court granted Owasso Independent School District's petition to review the decision issued by the Tenth Circuit Court of Appeals that grades recorded on test papers and homework are "educational records" within the meaning of the Family Educational Rights and Privacy Act (FERPA), and therefore protected from disclosure. Teachers in the school district engaged in the practice of having their students grade each other's homework assignments and test papers, and then call out the grades to the teacher in class. Falvo, who had three children attending school in the district, objected to the practice on the ground that it embarrassed her children to have classmates learn their grades. When the superintendent refused to end the practice, Falvo filed suit under § 1983 against the school district and school officials, alleging that the grading practice violated her children's right to privacy under the Fourteenth Amendment and FERPA. The appeals court ruled that the practice did not violate the students' right to privacy, but held that the grades were "education records" under FERPA. On the privacy claim, it concluded that the children had no reasonable expectation of privacy in their homework and test grades under the Constitution. On the FERPA claim, the court said: "Based purely on the language of the statute itself…the grades which students record on one another's homework and test papers and then report to the teacher constitute 'education records' under FERPA." As a result, the court concluded that the children's rights under FERPA were violated by the teachers' practice of having students grade each other's work and report the grade to the teacher in an open classroom.

C.H. v. Oliva, 226 F.3d 198 (3rd Cir.2000), *cert. denied subnom, Hood v. Medford Township Board of Education*, 121 S. Ct. 2519 (2001)

The Supreme Court refused to review a decision by the Third Circuit Court of Appeals that a school district did not violate an elementary student's free speech rights when his Thanksgiving poster was removed from the hallway of the school because it contained a religious theme. The case involved Z.H., a kindergarten student in Medford, New Jersey. As part of the Thanksgiving holiday, Z.H.'s teacher allowed her students to create posters depicting what they were "thankful for." Z.H.'s poster indicated that he was thankful for Jesus. His teacher displayed his poster along with his classmates' posters in the main hall outside the classroom. While the teacher was absent from school, another school employee removed Z.H.'s poster because of its religious nature. When the teacher returned to school she remounted the poster in the hall, but at a less prominent location at the end of the hallway. Z.H.'s mother, C.H., filed suit against the school district, alleging that Z.H.'s right to free speech had been violated when his poster was removed from display because of its religious theme. The circuit court ruled that there was no free speech violation, even though the poster was removed based on its religious content, because there was no evidence that the poster was removed as a result of a school district policy or rule. The court found that the poster was unilaterally removed by a school employee without the knowledge or consent of any school administrator.

West v. Derby Unified School Dist. No. 260, 260 F.3d 1358 (10th Cir.), *cert. denied,* 531 U.S. 825 (2000)

The Supreme Court denied certiorari and refused to review the decision of the Tenth Circuit Court of Appeals that a school district did not violate a middle school student's First Amendment right to free speech when it suspended him from school for three days after he drew a picture of a Confederate flag during class in violation of the school district's harassment and intimidation policy. Based on recent past events, some of which involved Confederate flags, the appeals court concluded that school officials had reason to believe that a student's display of a Confederate flag might cause disruption and interfere with the rights of other students to be secure and let alone. The circuit court also rejected the student's procedural due process and equal protection claims, and it held that the school district's racial harassment and intimidation policy was neither unconstitutionally overbroad nor unconstitutionally vague.

Milligan v. City of Slidell, 226 F.3d 652 (5th Cir. 2000)

The Fifth Circuit Court of Appeals ruled that police officers' act of detaining high school students for questioning in the vice principal's office about a rumored after-school fight did not violate the students' Fourth Amendment rights. It said that any interest the students had in attending classes unhindered was outweighed by the school's interest in protecting its students, fostering self-discipline, and deterring possibly violent misconduct. Moreover, the court said, the officers did not do anything that school officials could not have done themselves.

Neal ex rel. Neal v. Fulton County Board of Education, 229 F.3d 1069 (11th Cir. 2000)

The Eleventh Circuit Court of Appeals held that a high school football coach's alleged act of striking a student with a metal weight lock, resulting in the student's loss of the use of one eye, supported the student's claim of a violation of his substantive due process right to be free from excessive corporal punishment. A high school student who was member of the varsity football team brought a § 1983 action against the football coach, principal, superintendent, and school board, alleging that his coach violated his rights under the due process clause to be free from excessive corporal punishment. The student alleged that the coach intentionally used an obviously excessive amount of force that presented a reasonably foreseeable risk of serious bodily injury. In its ruling, the court noted that traditional forms of corporal punishment would rarely, if ever, result in the kind of injury that would support a federal due process claim for excessive corporal punishment.

Seal v. Morgan, 229 F.3d 567 (6th Cir. 2000)

The Sixth Circuit Court of Appeals held that a school board's suspension or expulsion for weapons possession of a student who denied any knowledge of a knife in the glove box of his car while it was on school property violated substantive due process. **[is this description accurate?]** After the student, Mr. Seal, was expelled, he brought action pursuant to § 1983, seeking monetary damages to compensate him for the board's decision to expel him. The appeals court reversed the district court's decision to grant a summary judgment in Seal's favor on the issue of liability. The court reasoned that suspending or expelling a student for weapons possession, pursuant to a zero tolerance policy, would not be rationally related to any legitimate state interest if the student did not knowingly possess any weapon, and thus the suspension or expulsion would violate substantive due process.

Moore v. Willis Independent School District, 233 F.3d 871 (5th Cir. 2000)

The Fifth Circuit Court of Appeals held that a teacher's conduct in imposing rigorous exercise by a student as punishment was not a substantive violation of due process because Texas law provides adequate remedies. Parents of the eighth grade student, Aaron Moore, had sued the school district and the gym teacher, alleging that the student suffered serious injury as a result of excessive exercise. Moore was enrolled in an elective gym class of which Allen Beene was one of the teachers. On the day in question, Beene observed Aaron talking to a classmate during roll call, a violation of a class rule. As punishment, Beene told Aaron to do 100 "ups and downs," also known as squat-thrusts. Aaron had not been subjected to similar punishment before, but he understood that if he stopped during this punishment, he either would be made to start over or would be sent to the principal's office. A classmate counted the 100 repetitions. Aaron's mother alleged that he was injured seriously as a result of the punishment and missed three weeks of school.

Castorina v. Madison County School Board, 246 F.3d 536 (6th Cir. 2001)

The Sixth Circuit Court of Appeals ruled that Madison Central High School could not suspend students for wearing T-shirts bearing a Confederate flag symbol without violating their free speech rights unless there was evidence of prior incidents of racial violence attributable to the display of Confederate symbols in school. The appeals court returned the case to the lower court for a trial on the question of whether there was evidence of prior racial animosity and actual racially motivated violence as a result of Confederate symbols being displayed on school grounds. The two students, Tim Castorina and Tiffany Dargavell, wore T-shirts depicting a Confederate flag to school. Relying on the school dress code prohibiting students from wearing any clothing or emblem that contains slogans having racist implications, principal William Fultz instructed the students to either turn the shirts inside out or remove them. They refused and were suspended for three days. They were suspended two more times for wearing the shirts to school before their parents decided to homeschool them for the remainder of the year. The students filed suit against the school district, alleging violation of their free speech rights.

Earls v. Board of Education of Tecumseh Public School District, 242 F.3d 1264 (10th Cir. 2001), *petition for cert. filed*, (August 24, 2001) (No. 01-332)

The Tenth Circuit Court of Appeals ruled unconstitutional a school district's mandatory drug testing policy for all public high school students participating in extracurricular activities. The policy of the Tecumseh School District in Pottawatomie County, Oklahoma, required those students to consent to random, suspicionless drug testing via urinalysis. Two students, Lindsay Earls and Daniel James, challenged the policy on the ground that it violated their Fourth Amendment right to be free from unreasonable searches. The circuit court found that drug use by students involved in extracurricular activities other than athletics, such as band or choir, did not expose them to any greater safety risk than is incurred by nonparticipants who use drugs. It also concluded that the school district's contention that it had an identifiable drug abuse problem among students involved in extracurricular activities was not supported by the record. The court pointed out that without the limitation of having to demonstrate identifiable drug abuse among a group of students, schools could test students "simply as a condition of attending school." In the panel's opinion, the Supreme Court would not be likely to uphold such broad testing as constitutional.

Wildman v. Marshalltown School District, 249 F.3d 768 (8th Cir. 2001)

The Eighth Circuit Court of Appeals ruled that a school had not infringed on a student's free speech rights by disciplining her for distributing a letter the school found disrespectful, because the right to express opinions on school premises is not absolute. Rebecca Wildman was a member of Marshalltown High School girls' junior varsity basketball team. She became frustrated when Coach Rowles failed to promote her to the varsity team. Rebecca then wrote a letter and distributed it to the members of both the varsity and junior varsity teams in which she criticized the coach and used the term "bullshit." When the coach learned of the letter, she met with Rebecca to discuss it. The coach told her that the letter was disrespectful and that she would not be allowed to continue to participate unless she apologized to her teammates. Rebecca refused and was cut from the team. She filed suit, asserting that her free speech rights were violated when the school disciplined her for distributing the letter. The appeals court pointed out that schools have the authority to proscribe public expression of vulgar and offensive comments. It found that Rebecca's letter contained profane language and was insubordinate. The court concluded that the school was justified in disciplining her to teach civility in expressing one's opinions and respect for coaches.

Fuller v. Decatur Public School, Board of Education School District No. 61,
251 F.3d 662 (7th Cir. 2001)

The Seventh Circuit Court of Appeals ruled that the Decatur School District's expulsion of six students for violating the district's rule prohibiting gang-like activity did not violate the students' right to due process. The six students, who were attending three different high schools in the Decatur School District, were engaged in a gang-related brawl during a high school football game. The rule under which they were expelled defined gang-like activity as "any conduct engaged in by a student (1) on behalf of any gang, (2) to perpetuate the existence of any gang, (3) to effect the common purpose and design of any gang, and/or (4) to represent a gang affiliation, loyalty, or membership in any way while on school grounds or while attending a school function. These activities include recruiting students for membership in any gang and threatening or intimidating other students or employees to commit acts or omissions against his/her will in furtherance of the common purpose and design of any gang." The appeals court rejected the students' contention that the gang-like activity rule was unconstitutional because it failed to clearly define what conduct was prohibited. It found that the school district's rule did not require the same degree of detail that criminal laws do because the sanctions imposed by the school were not of a criminal nature. Pointing to the school district's need "to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process," the court concluded that while the rule was written to encompass a broad range of "gang-like" conduct that interfered with the educational process, it was sufficiently clear on which conduct would be considered gang activity to survive a constitutional challenge based on vagueness.

LaVine v. Blaine School District, 257 F.3d 981 (9th Cir. 2001)

The Ninth Circuit Court of Appeals ruled that a school's emergency expulsion of a student it deemed might be a danger to himself, other students, or school personnel, which state law allowed, did not violate the student's First Amendment rights, but that the school district had violated his rights by maintaining a record of the expulsion in his file. James LaVine, a student at Blaine High School, wrote a poem in which the narrator goes on a shooting spree at school, killing 28 people and then committing suicide. When his teacher read the poem, she became concerned about James's state of mind and contacted his school counselor, who also expressed concern because James had confided to her that he had suicidal thoughts. At a meeting with the vice principal, the teacher said James had moved out of his parents' home after filing criminal charges against his father for assault, and that he was accused of stalking an ex-girlfriend. After reviewing James's disciplinary file, which contained incidents of fighting and insubordination, the vice principal asked the local police department for assistance. When neither the police nor professionals at the community mental health center could find grounds for detaining James for psychiatric evaluation, he discussed the situation with principal Dan Newell. Newell decided to expel James under a state law that allows a school official to immediately expel a student if the official "has good and sufficient reason to believe that the student's presence poses an immediate and continuing danger to the student, other students, or school personnel or an immediate and continuing threat of substantial disruption of the educational process." James and his parents were informed of the expulsion via telephone and received a formal letter of expulsion the next day during a meeting with Newell. James remained expelled for 17 days until the psychiatrist he agreed to see cleared him to return to school. James completed the year with no further incidents. However, a permanent record of his expulsion was kept in his file. In his suit, James alleged that the school district had violated his free speech rights by expelling him and maintaining a record of the expulsion in his file. The appeals court found that because the poem was neither obscene nor plainly offensive speech, nor was it school-sponsored speech, the school district was justified in suppressing the speech only if circumstances surrounding the speech would have reasonably led school officials to forecast substantial disruption of, or material interference with, school activities. The court concluded that given the totality of the circumstances, school officials acted reasonably in expelling James to avoid a potentially violent incident from occurring and protect the safety of James and other students. It found that James was not expelled for disciplinary reasons based on the content of the poem but rather for safety reasons. It found that because the expulsion was for safety reasons and the danger had passed, keeping a permanent record of the expulsion in his file was punitive in nature. It said keeping documentation of the expulsion in the file would "permanently blemish" James's record even though the threat to school safety had already passed.

Neague v. Cynkar, 258 F.3d 504 (6th Cir. 2001)

The Sixth Circuit Court of Appeals ruled that a principal and a police sergeant who had handcuffed a student were entitled to qualified immunity from the student's claim that his Fourth Amendment right to be free from excessive force had been violated. Jonathan Neague, a student at Worthingway Middle School, was given three Saturday detentions for being involved in two fights at school. Principal Paul Cynkar called Jonathan to his office after he received a letter from Jonathan's mother objecting to the Saturday detentions. When the principal began questioning Jonathan about the letter, Jonathan became verbally abusive and knocked a tape recorder the principal was holding out of his hands. Jonathan then ran out of the office and returned to the cafeteria to eat lunch. The principal's secretary called the police. When they arrived at the cafeteria with the principal, Officer Kim Hurst asked Jonathan to come with them to the office. Jonathan stepped on her foot and began leaving the cafeteria. As he was exiting, another officer, Sergeant Murphy, grabbed Jonathan's arm and held it behind his back. When they reached the office, Sergeant Murphy complied with the principal's request to handcuff Jonathan. When Jonathan's parents arrived about 30 minutes later, the handcuffs were removed. Jonathan suffered no physical injury as a result of being handcuffed. Although the principal did not press criminal charges, Jonathan was suspended for ten days. Jonathan's suit alleged that Principal Cynkar, Sergeant Murphy, and the school district had violated his Fourth Amendment right to be free from excessive force when Sergeant Murphy handcuffed him. The appeals court found that when a person is handcuffed incident to a lawful arrest, a claim of excessive force will fail in the absence of an allegation of physical injury resulting from the handcuffing.

Ream v. Centennial School District, 765 A.2d 1195 (Pa. Cmwlth. 2000)

The Commonwealth of Pennsylvania Court held that a school district was required to award a high school diploma to a student who, while on suspension, completed her coursework and her final examinations while awaiting an expulsion hearing, even though the student ultimately was expelled by the district. Kristin Ream, a high school senior, was found to be in possession of ecstasy pills after the police performed a sweep of the high school grounds for drugs. At the time of her arrest, Ream was already on probation for possession of marijuana and underage drinking, and the district immediately suspended her from school. After Ream was suspended and while she was awaiting her expulsion hearing, the school district continued to provide instruction under the auspices of a home-tutoring program. Ream then completed her classwork and took her final exams. At the expulsion hearing, Ream asserted that she had completed all of her course work, examinations, and other requirements for graduation and should be awarded a diploma. In addition, she testified that she had been accepted to, and planned to attend, Pennsylvania State University, and that her admission was contingent on receipt of a high school diploma. The district expelled Ream and voted to deny her a diploma. Following her expulsion, Ream earned her GED and was subsequently admitted to Penn State.

Shoemaker v. State, 38 S.W. 3d 350 (Ark. 2001)

The Arkansas Court of Appeals overturned the misdemeanor conviction of a student for abusing or insulting a teacher in the performance of his or her duties on grounds that the state law prohibiting those actions violated the student's free speech rights. Stefany Shoemaker, a student at Oakdale Middle School in Benton County, Arkansas, was convicted of violating the state criminal code section that made those actions a misdemeanor. Stefany had been charged after she called her science teacher a "bitch." The appeals court ruled that the law as written infringed on the student's free speech because its prohibition on speech was not limited to speech that is likely to inflict injury by its very utterance or "tend to incite an immediate breach of the peace." It also found that the law was unconstitutionally vague because it failed to "adequately inform the public of proscribed conduct."

In the Matter of L.A., 21 P.3d 952 (Kan. 2001)

The Kansas Supreme Court, in upholding a juvenile court's decision against a student on drug charges, found that the circumstances in the case satisfied the reasonable suspicion standard for conducting a search in a school setting, and that school security officers were not required to give *Miranda* warnings because the officers' primary function is not law enforcement. The assistant vice principal at Campus High School in Haysville, Kansas, received information from the school librarian that a student named L.A. had marijuana concealed in the headband of his baseball cap. A school security guard brought L.A. to the assistant vice principal's office. She told L.A. she had been informed that he had drugs, but he denied having anything illegal in his possession. She then telephoned L.A.'s mother, who consented to a search. She and the security guard conducted a search that netted a packet of diazepam, marijuana, and Valium. Under questioning, L.A. made admissions to the security guard, who questioned L.A. without giving him *Miranda* warnings. A juvenile court adjudicated L.A. a juvenile offender for possession of the marijuana and the diazepam.

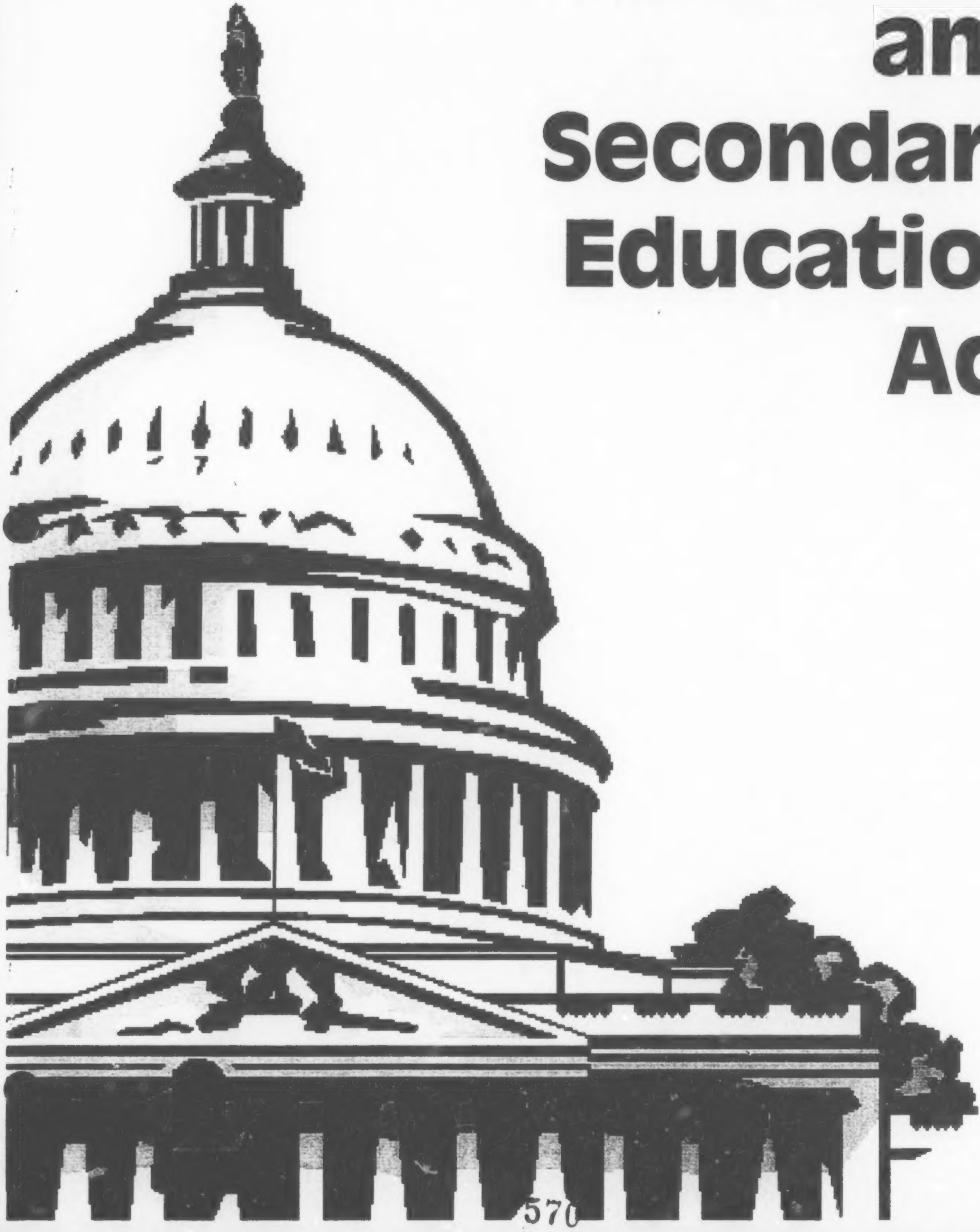
Busch v. Omaha Public School District, 623 N.W.2d 6722 (Neb. 2001)

The Nebraska Supreme Court ruled that the Omaha Public School District had not exceeded its authority under state law in adopting a rule providing for expulsion of students who injure school employees who are attempting to prevent or break up a fight. Porcha Busch, a seventh grade student at McMillan Magnet Center in Omaha, was expelled from school for violating the student code of conduct after she accidentally struck an assistant principal who was trying to break up a fight between Porcha and another student. Busch filed suit, alleging that the school district lacked the authority under state law to adopt the expulsion rule. The appeals court said the use of force or violence to injure a school employee who is attempting to prevent or stop a physical altercation does constitute a "substantial interference with school purposes" within the meaning of the state law.

Commonwealth v. Buccella, 751 N.E. 2d 373 (Mass. 2001)

The Massachusetts Supreme Court, remanding the case to a trial court for further proceedings, found that a student had no expectation of privacy in his handwriting, that homework and other written student work assignments do not come within the definition of "student records" and therefore are not protected by the confidentiality provisions of state law, and that a vice principal was justified in providing samples of the student's school papers to the police because he had reasonable grounds for believing that analysis of the student's handwriting by the police would lead to evidence that the student had violated the law. Domenic Buccella, a special education student at East Bridgewater High School, engaged in a pattern of disruptive behavior that included directing racial slurs at his teacher. In September 1997, he was identified as one of many suspects when someone wrote racial slurs on the blackboard in her classroom. In October 1997, after the school was vandalized twice with obscene words and wavy lines written on the hallway walls, the vice principal informed the police that Domenic was a suspect. The police conducted an analysis of Domenic's handwriting from samples of his schoolwork papers provided by the vice principal. The police then charged Domenic with malicious destruction of property and violation of civil rights. The trial court granted Domenic's motion to suppress the handwriting analysis and samples on the ground that they were illegally obtained by police, with neither his consent nor a warrant for them. The court then granted Domenic's motion to dismiss the charges on the ground that the evidence used to charge him was illegally obtained. The state supreme court disagreed.

Elementary and Secondary Education Act



·NSBA· **Legislative Position Paper**

Elementary and Secondary Education Act: Legislative Focus During the 107th Congress

◆ The Federal Legislation

The Elementary and Secondary Education Act (ESEA) comprises the major part of the federal government's commitment to K-12 education. The dual emphasis of ESEA, especially for the Title I programs has been to: 1) raise the bar for educational programs through a focus on high standards provided by the states and local school districts; and 2) ensure that children living in high-poverty communities could achieve higher standards. Collectively, ESEA and its related programs authorize $16 billion in funding for states and school districts to expand the opportunities for the success of all children. These programs include Title I for Disadvantaged Children and most other major federal programs except vocational and special education. Virtually every school district receives some federal funds through ESEA programs. ESEA, first passed by Congress in 1965 and last authorized in 1994, expired on September 30, 1999. Since that time, the existing programs have been extended through the appropriations process.

◆ The White House

President George W. Bush identified education as one of his top priorities and quickly released his education plan, Leave No Child Behind, that called for increased accountability for educational performance in exchange for greater flexibility at the local level. The plan proposed that states, school districts, and schools receiving Title I funds establish annual assessments for every child in grades 3 through 8 in math and reading. States would select and design assessments of their choosing, and the results in student achievement would be compared from year to year. The results would also be given to the public disaggregated by race, gender, English language proficiency, disability, and socio-economic status. States would have three years to develop and implement the assessments, and the federal government would cover the cost of developing these assessments. The plan also called for sanctions to schools and school districts if improvements were not made within specific time frames. The plan contained many appealing features, but some that raised very serious concerns.

◆ The Congress

During the 107th Congress, members of the House and the Senate expected to draft legislation that would contain new requirements for assessments and accountability, and improve student achievement across the nation.

During the first session of the 107th Congress, the U.S. House of Representatives and the U.S. Senate both passed their versions of the Elementary and Secondary Education Act (ESEA). Both bills set a goal for all students to be "proficient" in reading and math, and linked sanctions and rewards to these assessments. Additionally, the concept of adequate yearly progress (AYP) was expanded beyond monitoring to having a direct relationship to sanctions.

Further, the bills placed a disproportionate emphasis on a flawed accountability plan without regard for the significant financial investment that will be needed to not only develop assessments, but also to implement those educational strategies necessary to significantly improve student performance within the time lines established. Finally, the proposed authorizations do not appear to be adequate to address the new requirements levied on states for the development of these assessments. A conference committee is now working out the differences between the two bills. The conference committee will write a final bill to be considered again by each chamber, which will be sent to the president for signature once it passes both chambers.

♦ **House Bill**

By a margin of 384-45, the House of Representatives passed, No Child Left Behind Act of 2001, H.R. 1, its version of ESEA on May 23, 2001. Several education victories occurred including:

- **Straight A's Amendment Withdrawn** – The DeMint (R-SC) amendment was withdrawn that would have allowed seven states and 25 school districts to participate in the Straight A's block grant program. NSBA opposed the amendment because the flexibility in the program should have been designed only for school districts and not states. Although this provision is not in the House-passed bill, it is in the Senate version. *NSBA opposes this provision.*

- **Local School District Flexibility for Program Consolidation Amendment Passed** – The Tiberi (R-OH)/Castle (R-DE) amendment that allows 100 school districts to enter into performance agreements with the secretary of education so that the school districts can consolidate federal funds from several federal education programs passed by a 217-209 margin. *NSBA supports this amendment so that local school districts will be able to tailor implementation of education programs in a manner that would effectively meet the needs of the students in their particular school districts.*

- **Voucher Amendments Defeated in House** – The Armey (R-TX)/Boehner (R-OH)/Delay (R-TX) amendment would have included a variety of vouchers including allowing students to take a portion of their Title I funding to subsidize their attendance at a private school was defeated by a 155-273 margin. The Armey (R-TX)/Delay (R-TX)/Watts (R-OK) amendment would have authorized $50 million to fund up to five research demonstration projects involving public and private schools to demonstrate the effects of school choice. It was defeated by a 186-241 margin. *NSBA opposes voucher amendments.*

- **Student Discipline Amendment Passed** – The Norwood (R-GA)/Barr (R-GA)/Graves (R-MO) amendment passed; it allows local school districts to discipline a disabled student in the same manner as they would a non-disabled student if the student has a weapon, knowingly possesses or uses illegal drugs, or commits aggravated assault or battery at school. The amendment passed by a final vote of 246-181. *NSBA supports this amendment.*

- **The Brady Liability Protection Amendment Passed** – This amendment provides liability protection to teachers, administrators, school boards/school board members, and other education officials who take reasonable actions to maintain discipline in the classroom. The amendment passed by a vote of 239-189. *NSBA supports giving school boards and members liability protection with respect to student discipline issues.*

Unfortunately, the House version of ESEA contains several amendments that NSBA opposes, including:

- **Military Recruiter Access to Secondary Schools Amendment Passed** – The Vitter (R-LA)/Sessions (R-TX) amendment passed by a vote of 366-57. This amendment will require secondary schools that accept federal funds to allow military recruiters to visit the school. *NSBA opposes this amendment because it would expand the role of the federal government into local decision-making authority. There is language already adopted by Congress that outlines a process for review by local school districts when military recruiters are denied access by secondary schools. The current law grants local school districts the final authority regarding access, as it should be.*

- **Parent Freedom and Protections Amendment Passed** – The Graham (R-SC)/Tiahrt (R-KS) amendment, opposed by NSBA, was agreed to by voice vote. While this amendment will guarantee parents the access to review the curriculum to which their children are exposed, it requires written consent prior to any student being required to participate in a survey, analysis, or evaluation. NSBA opposes this amendment because it will make it extremely difficult for local school districts to conduct a broad range of surveys. Additionally, NSBA believes this amendment would result in increased litigation against local school districts since the language would be subject to interpretation by parents and local community organizations.

- **Objective Testing Amendment Passed** – The Akin (R-MO) amendment, opposed by NSBA, was agreed to by a voice vote. This amendment would require that testing becomes a test of objective knowledge based on measurable, verifiable, and widely accepted professional testing and assessment standards, and shall not assess the personal opinions, attitudes, or beliefs of the student being tested. *NSBA opposes this provision because the scope is too broad and the language of the amendment is unclear. Additionally, increased litigation could be filed against local school districts, and the federal government would find itself in a much-expanded role into the state and local decision-making process.*

- **Local School District Restrictions Amendment Passed** – The Hilleary (R-TN) amendment was agreed to by a voice vote. This amendment will prevent any state or local school district or school from giving access to its facilities by community organizations if it denies access to the Boy Scouts of America. This amendment has very serious ramifications. *This amendment dilutes the authority of local school districts regarding use of school facilities and potentially eliminates all funds made available from the U.S. Department of Education to local school districts – should the Boy Scouts of America or any group be denied access due to their policy against homosexuals in leadership positions.*

- **Senate Bill**

The Senate passed its version of the Elementary and Secondary Education Act (ESEA), Better Education for Students and Teachers, S.1, by a vote of 91-8 on Thursday, June 14, 2001. The senators who voted against the bill are Bennett (R-UT), Helms (R-NC), Inhofe (R-OK), Nickels (R-OK), Kyl (R-AZ), Voinovich (R-OH), Feingold (D-WI) and Hollings (D-SC).

The Senate version provides for annual testing of all students in grades 3 through 8 in math and reading, authorizes full funding for the Individuals with Disabilities Education Act (IDEA) and authorizes significantly increased funding for Title I. While the bill has several constructive features, there are several significant provisions that must be addressed as the bill progresses in conference.

Among the provisions most opposed by NSBA are: 1) the Straight A's pilot that includes seven states; and 2) the method by which adequate yearly progress (AYP) is determined.

- **Straight A's for the States**—The focus of the design and flexibility of this performance agreement that allows funds to be consolidated should only be at the local school district where accountability for improved student achievement rests. NSBA has continued to lobby against involving states since this would invite local school districts to compete with each other needlessly and result in a politicized process.

- **Adequate Yearly Progress (AYP)**—NSBA believes the AYP concept is flawed. Although we support the concept of measuring yearly progress of students, we believe that the progress of schools and entire school systems require a different set of principles and standards that are related but independent. We believe the ultimate objective of the accountability provisions should be to ensure that every child in low-performing public schools has access to a public education that meets rigorous performance standards. Without appropriate remedies to these issues, many schools will be mislabeled as failing when they are not. Additionally, unless programs like Title I and IDEA are adequately funded, many schools in need of improvement will not have the financial resources to meet these goals.

- **ESEA Conference Committee**

The chairman of the conference committee is Representative Boehner (R-OH-8). Other House conferees include: Representatives Petri (R-WI-6); Roukema (R-NJ-5); McKeon (R-CA-25); Castle (R-DE-AL); Graham (R-SC-3); Hilleary (R-TN-4); Isakson (R-GA-6); Miller (D-CA-7); Kildee (D-MI-9); Owens (D-NY-11); Mink (D-HI-2); Andrews (D-NJ-1); and Roemer (D-IN-3). The Senate conferees include: Senators Kennedy (D-MA); Dodd (D-CT); Harkin (D-IA); Milkulski (D-MD); Jeffords (I-VT); Bingaman (D-NM); Wellstone (D-MN); Murray (D-WA); Reed (D-RI); Edwards (D-NC); Clinton (D-NY); Lieberman (D-CT); Bayh (D-IN); Gregg (R-NH); Frist (R-TN); Enzi (R-WY); Hutchinson (R-AR); Warner (R-VA); Bond (R-MO); Roberts (R-KS); Collins (R-ME); Sessions (R-AL); DeVine (R-OH); Allard (R-CO) and Ensign (R-NV).

- **NSBA's Key Issues in Conference**
  - **Accountability, Corrective Action and Adequate Yearly Progress (AYP)** – NSBA is urging the conferees to significantly modify the accountability methodology provisions contained in both the House and Senate versions of the bill. We proposed the following specific recommendations:
    - Provide adequate funding for development of assessments;
    - Establish additional categories of school performance so as not to treat improving schools the same as schools with no improvement;
    - Develop criteria that would trigger sanctions beyond student performance;
    - Shift the AYP model from a cohort model to a growth model; and
    - Target school improvement resources to the lowest performing school districts by allocating a portion of the new Title I funding.

  - **Local School District Flexibility** – NSBA is urging conferees to increase flexibility at the local school district level by: 1) supporting the transferability provisions for local school districts so that local school districts can focus on their priorities and transfer funds between selected federal programs; and 2) supporting the House provision that gives 100 school districts the authority to consolidate federal funds from several federal education programs.

  - **Straight A's State Block Grants** – NSBA is urging conferees to reject provisions that would authorize seven states to participate in a block grant program on the principle that flexibility should reside at the local school district level. By contrast, state block grants will result in a politicizing of the process, more state rulemaking, and the potential for diverting funds away from those districts most in need.

  - **Supplemental Services** – NSBA is urging conferees to modify the supplemental services provisions by requiring states to consult with the LEAs in the development of the state-approved service provider's list. Local school districts need a more active role in assessing the programmatic services to determine if there is a match between the needs of the school and the student relative to curricula and assessments and the services of the provider.

  - **Equity in Student Discipline** – NSBA is urging conferees to support the inclusion of the Norwood and Sessions student discipline amendments to ESEA pertaining to children enrolled in special education programs who bring weapons or drugs to school, or otherwise pose a danger to others. These amendments will increase local flexibility and help local schools to provide safer learning environments for all children. Both of these amendments will protect and provide due-process rights for all children, while improving the safety and learning atmosphere in schools. Furthermore, these provisions will guarantee that the discipline determinations are made on a student-by-student and case-by-case basis. This is better than the current dual discipline system, which can result in two different sanctions, one for children enrolled in special education and one for all other children. These amendments will allow the local official to decide the action needed, rather than have the action dictated by the federal government.

- **Teacher Quality** — NSBA is urging conferees to adopt language that will establish realistic goals and timelines for requiring all teachers to be fully qualified. NSBA has concerns over the targeted dates for all teachers and paraprofessionals to be fully qualified in higher poverty and Title I schools in four years. In view of the projected teacher shortages, and the current quality of the workforce in high-poverty and many low-performing schools, it is unrealistic to expect that such schools will meet this requirement without substantial assistance from the federal and state government agencies. Additionally, the certification requirements for newly hired and currently employed paraprofessionals create equally disturbing circumstances for local school districts — and should be modified to reflect a more realistic time line.

- **Limited English Proficiency** — NSBA is urging conferees to oppose federally mandated time limits (three years) to achieve English fluency. This is a matter to be decided by states and local school districts, as influenced by local needs, conditions, and circumstances. Additionally, the severe shortage of qualified English instruction teachers, and the wide variations among school populations having the need for English instruction, are significant variables that affect the capacity and capability of a school district to meet such a requirement. Further, NSBA is urging the conferees to oppose the requirement for parental consent prior to placement of a student in bilingual classes or any classes not taught primarily in English. Securing written consent, particularly in schools with large populations of LEP students could result in delays that would adversely affect delivery of instruction and student performance. Rather than requiring formal parental consent prior to placement, school districts should be encouraged to formally notify parents regarding such placements, and include the option to remove the student from instruction if the parent so desires.

- **Liability Protection for School Boards and Members** — NSBA is pleased that both the House and Senate bills include provisions to provide school board members with liability protection regarding actions taken in official capacity to maintain school discipline. The Senate provision includes liability protection for individual school board members, and the House provision expands the coverage to include the entire school board. NSBA is urging conferees to support the House provision. Unless the school board itself is excluded from liability, there will be a adverse effect on the development and implementation of effective disciplinary policies in this narrow area — even if the individuals are not held personally liable. School district budgets are stretched too far and unnecessary litigation results in less money being spent on educating our nation's students. We believe that providing school boards liability protection will reduce litigation costs in local school districts.

- **Excessive Administrative Requirements and Student Privacy** — NSBA is urging conferees to oppose the inclusion of the Dodd/Shelby Student Privacy Amendment. This amendment would impose a tremendous administrative and financial burden on school districts that engage in positive productive collaborations with businesses. Also, this amendment would have a chilling effect on children's access to the Internet, as a result of the extensive requirements placed on schools by the amendment. Not only would schools be required to collect permission slips from children's parents, but they would also have to contact all web sites visited by children during the school day to determine if the operator of the web site collects any information (personal or non-identifiable), and if so, what the web site intends to do with this information. This would apply even to web sites that track "hits" or daily visitors. Given this administrative burden, many schools would find themselves unable to comply and would subsequently reduce collaborations with businesses and curtail Internet access for students.

Student privacy is already protected by several federal laws including the Children's Online Privacy Protection Act (COPPA) and the Family Educational Rights and Privacy Act (FERPA) and the Pupil Rights and Privacy Protection Act.

- **Pesticide Use in Schools**—NSBA is urging conferees to reject the School Environment Protection Act of 2001 regarding pesticide use in schools. On July 18, 2001, Marshall Trammell testified on behalf of NSBA before the House Agriculture Subcommittee on Department Operations, Oversight, Nutrition and Forestry. Mr. Trammell is the chairman of the Chesterfield County School Board in Virginia and is employed as the program coordinator for the Certification, Licensing, Registration, and Training section for the Virginia Department of Agriculture and Consumer Services Office of Pesticide Services. He testified that: 1) the Senate ESEA provision on pesticides would amount to a grossly under-funded mandate on local schools; 2) this legislation establishes unrealistic timeframes; 3) Chesterfield County already has a school pesticide plan and does not need additional federal mandates; and 4) that school districts may be subject to increased liability.

- **Rural Education Achievement Programs**—NSBA is urging conferees to support the reauthorization of the Rural Education Flexibility and Assistance Program endorsed by both the Senate and House versions of the bill. Such increased flexibility will enable rural and small school districts to address their unique problems related to instructional delivery in a more efficient and effective manner.

- **21st Century Learning Centers**—Both the Senate and House versions of the bill would allow direct funding to community-based organizations and other public or private organizations, including private or religious schools or organizations. The current statutory language allows private entities, including religious organizations, to participate as community partners, but maintains accountability and civil rights safeguards by leaving the administration of programs to local school districts. NSBA is urging conferees to reject these provisions and maintain current law.

- **Teacher Voluntary Early Retirement Incentives**—Although not specifically included in either the Senate or House bills, NSBA is urging conferees to include the provisions of the Teacher Voluntary Early Retirement Incentive Act of 2001, H.R. 2558, in the final bill. Many local school districts will be unable to implement the major education reforms necessary without major realignment of their workforce. In many instances this will require volunteer early retirement incentives for teachers and other key personnel.

Unfortunately, today, local school districts could be subject to litigation based on age discrimination if they offer certain early retirement incentives. Representatives Thomas Petri (R-WI) and Ron Kind (D-WI) introduced H.R. 2558 to amend the Age Discrimination in Employment Act (ADEA) with respect to early retirement benefits. The bill would clarify that early retirement incentive plans based on age are lawful. Such incentives have proven to be beneficial to school districts in restructuring the workforce to accommodate emerging needs. Equally important, such incentives are already lawful in higher education institutions as a result of an amendment to ADEA passed by Congress in 1998.

- **NSBA Position**

Reports indicate that the conference committee has been unable to progress aggressively - in part due to the more urgent matters that need to be addressed by Congress and the White House resulting from the recent terrorists acts against the World Trade Center and the Pentagon. Based on the outcome of the negotiations on several critical provisions and the adequacy of the funding commitment (for special education funding in particular), NSBA will determine its level of support or opposition for final passage.

For further information, please contact Reginald M. Felton, director of federal relations, at 703-838-6782, or e-mail rfelton@nsba.org.

September 2001

The National School Boards Association is a nonpartisan national federation of state and territorial school boards associations that represent more than 95,000 school board members who govern the nation's public schools. The organization's mission is to foster excellence and equity in public elementary and secondary education throughout the United States through local school board leadership.

·NSBA·

Excellence and Equity in Public Education through School Board Leadership

Office of Advocacy

- James R. Ruhland
President
- Anne L. Bryant
Executive Director
- Michael A. Resnick
Associate
Executive Director

August 15, 2001

Member
House and Senate Conference Committee on the
Elementary and Secondary Education Act
Washington, D.C.

Dear Conferee:

The National School Boards Association (NSBA), representing the nation's 95,000 local school board members, wishes to express our views and offer recommendations for consideration during the reauthorization conference for the Elementary and Secondary Education Act (ESEA). NSBA believes it is critical to share with you our priority concerns so that you will make effective decisions in your negotiations with respect to the affect the legislation will have on local school districts.

NSBA urges you to support those provisions contained in the House and Senate bills that preserve the integrity and success of the sound educational principles of our nation's public schools and to reject those provisions that would substantially alter those principles. Our support for the bill, however, will depend upon how these critical concerns are ultimately addressed. Therefore NSBA offers comments on the following priority areas:

- **Full Funding of IDEA**—NSBA supports the inclusion of the Harkin/Hagel IDEA full funding amendment. This amendment would assist every school district in this country by providing the full federal commitment to educate children with disabilities. As a result, school districts would have greater flexibility and more resources at the local level for standards, assessments, modernization, and other locally determined priorities that have not been met due to the federal IDEA funding shortfall.

  While NSBA supports increased accountability, Congress needs to be held to the same level of accountability. Specifically, they must fulfill the financial commitment promised 26 years ago. At the very foundation, ESEA without IDEA funding will not accomplish the lofty goals proposed. Rather, schools will face the same funding shortfalls while struggling to implement new provisions in the legislation. Therefore, it is disingenuous to propose education reform without addressing the single greatest partially funded mandate in the local school district—IDEA. *If the Harkin/Hagel IDEA full funding amendment is not included in the final ESEA bill, it will be difficult for NSBA to support ESEA.*

- **Accountability, Corrective Action and Adequate Yearly Progress (AYP)**—NSBA urges you to significantly modify the accountability methodology provisions contained in both the House and Senate versions of the bill. The adequate yearly progress (AYP) concept as drafted in both bills is flawed. Without appropriate remedies to these issues, Congress will create federal programs that cannot succeed due to the over identification of schools as "failing." Although NSBA supports the concept of measuring yearly progress of students, we believe that the progress of schools and the entire school system require a different set of principles and standards that are related but independent. NSBA developed, in partnership with the American Association of School Administrators (AASA), specific recommendations to address AYP that have been sent to you under different cover. However, we take this opportunity to highlight some of the major provisions of our recommendations:

- Authorize sufficient resources to the states not only to develop the assessments, but also to implement those education strategies necessary to significantly improve student performance within the time lines established.
- Establish additional categories of performance for schools and school districts so that schools and school districts that are making progress are not treated the same as those that are making no progress. By establishing additional categories there would be recognition of the differences in school improvement and only those schools that were in fact failing would be so identified.
- Modify the criteria that would trigger sanctions beyond student performance by also recognizing the wide range of conditions that could affect school performance beyond the control of the school district. Circumstances such as significant decreases in funding, changes in demographics, shifts in enrollment, increases in immigrant populations, and major changes in the socio-economic status of students can have adverse affects on performance.
- Shift the AYP model from the use of a cohort model, which compares year-end snapshots, to that of a growth model that would concentrate on increased achievement throughout the year. This would encourage a focus on the entire year, rather than the performance on one test at the end of the year.
- Target resources for school improvement to the lowest performing school districts. States and school districts must have the capacity to assist schools in the effective use of educational programs and resources. With increased appropriations for the Title I program anticipated, we believe there is an opportunity to further target resources aimed at bringing the know-how and personnel support needed to implement school reform models in "failing" schools. Therefore, we recommend that 50 percent of all new Title I funds go toward school improvement assistance programs until adequate funds are made available, currently estimated at $2 billion.

- **Local School District Flexibility**—NSBA urges you to increase flexibility at the *local school district* level. NSBA supports the transferability provisions for local school districts so that local school districts can focus on their priorities and transfer funds between selected federal programs. Also, NSBA supports the House provision that gives 100 school districts the authority to consolidate federal funds from several federal education programs. This amendment will increase the authority of local school districts to consolidate programs and to therefore have the ability to tailor federal education programs in a manner that would meet the needs of the students in their local school districts.

- **Straight A's State Block Grants**—NSBA urges you to reject the Senate provision that would authorize seven states to participate in a block grant program. Rather than provide flexibility at the state *and* local school district levels, the focus of the design and flexibility of this performance agreement should be *only* at the local school district level. It is at the local school district level where services are provided, accountability for improved student achievement rests, and the students are enrolled. Involving the states will invite local school districts to compete with each other needlessly, resulting in a politicizing of the process, more state rulemaking, and the potential for diverting funds away from those districts most in need. While NSBA strongly supports *local school district* flexibility, the inclusion of *state block grant* provisions could preclude NSBA's support for the final bill.

- **Supplemental Services**—NSBA urges you to modify the supplemental services provisions by requiring states to consult with the LEAs in the development of the state-approved service provider's list. Local school districts need a more active role in assessing the programmatic services to determine if there is a match between the needs of the school and the student relative to curricula and assessments and the services of the provider. Given the consequences for the LEAs—should the service providers fail to bring about improvements, including state takeovers—LEAs should be included in the decision-making process. Without such consultation, LEAs would be forced to enter into agreements with vendors whose services may not be consistent with the LEAs procurement policies or contract performance standards. Additionally, the Senate bill would permit pervasively sectarian organizations to be included in the state lists of approved providers—which can involve both legal and community difficulties at the local level.

- **Equity in Student Discipline**—NSBA supports the inclusion of the *Norwood and Sessions student discipline amendments* to ESEA pertaining to children enrolled in special education programs who bring weapons or drugs to school, or otherwise pose a danger to others. These amendments will increase local flexibility and help local schools to provide safer learning environments for all children. Both of these amendments will protect and provide due-process rights for all children, while improving the safety and learning atmosphere in schools. Furthermore, these provisions will guarantee that the discipline determinations are made on a student-by-student and case-by-case basis. This is better than the current dual discipline system, which requires two different sanctions. These amendments will allow the local official to decide the punishment, rather than have the punishment dictated by the federal government, which prescribes different sanctions for different classifications of students, and does not take into account the severity of the safety violation.

- **Teacher Quality**—NSBA urges you to adopt language that will establish realistic goals and time lines for requiring all teachers to be fully qualified. NSBA applauds the consolidation of federal education programs and the increased flexibility in the use of professional development funds. The flexibility must be invested at the school district level where the accountability for improved student achievement rests. However, NSBA has concerns over the targeted dates for all teachers and paraprofessionals to be fully qualified in higher poverty and Title I schools. In view of the projected teacher shortages, and the current quality of the workforce in high poverty and many low performing schools, it is unrealistic to expect that such schools will meet this requirement without substantial assistance from the federal and state government agencies. Additionally, the certification requirements for newly hired and currently employed paraprofessionals create equally disturbing circumstances for local school districts—and should be modified to reflect a more realistic time line.

- **Limited English Proficiency**—The conference committee will consider whether or not to mandate that schools obtain written parental consent *prior to* providing LEP students appropriate academic and language support. The committee will also consider whether or not to require schools to design programs aimed at transitioning LEP students out of specialized language support programs within three years.

  NSBA supports high standards for all students including those with limited English proficiency (LEP). However, NSBA opposes federally mandated time limits to achieve English fluency. This is a matter to be decided by states and local school districts, as influenced by local needs, conditions, and circumstances. Additionally, the severe shortage of qualified English instruction teachers and the wide variations among school populations having the need for English instruction are significant variables that affect the capacity and capability of a school district to meet such a requirement. Additionally, NSBA opposes the requirement for parental consent *prior to* placement of a student in bilingual classes or any classes not taught primarily in English. Securing written consent, particularly in schools with large populations of LEP students, could result in delays that would adversely affect delivery of instruction and student performance. Rather than requiring formal parental consent prior to placement, school districts should be encouraged to formally notify parents regarding such placements, and include the option to remove the student from instruction if the parent so desires.

- **Liability Protection for School Boards and Members**—NSBA is pleased that both the House and Senate bills include provisions to provide school board members with liability protection regarding actions taken in official capacity to maintain school discipline. The Senate provision includes liability protection for individual school board members, and the House provision expands the coverage to include the entire school board. NSBA urges you to support the House provision. Unless the school board itself is excluded from liability, there will be a "chilling effect" on the development and implementation of effective disciplinary policies in the narrow area—even if the individuals are not held personally liable. School district budgets are stretched too far and unnecessary litigation results in less money being spent on educating our nation's students. Providing school boards liability protection will reduce litigation costs in local school districts. It should be emphasized that with respect to school discipline, professional educators are subject to school district policies; court-enforceable, due-process requirements; and in any extreme cases, the criminal code. And when it comes to such areas as criminal conduct and gross negligence, the exemption of this provision would not apply. Accordingly, this provision retains the limits and deterrence of possible professional error or misconduct through other legal avenues while enabling school officials to do their jobs, without fear of litigation, in rendering their sound judgement in the great majority of situations involving student safety and a sound learning environment.

- **Excessive Administrative Requirements and Student Privacy**—NSBA opposes the inclusion of the *Dodd/Shelby Student Privacy Amendment*. This amendment would impose a tremendous administrative and financial burden on school districts that engage in positive productive collaborations with businesses. Also, this amendment would have a chilling effect on children's access to the Internet, as a result of the extensive requirements placed on schools by the amendment. Not only would schools be required to collect permission slips from children's parents, but they would also have to contact all web sites visited by children during the school day to determine if the operator of the web site collects any information (personal or non-identifiable), and if so, what the web site intends to do with this information. This would apply even to web sites that track "hits" or daily visitors. Given this administrative burden, many schools would find themselves unable to comply and would subsequently reduce collaborations with businesses and curtail Internet access for students.

  Student privacy is already protected by several federal laws including the Children's Online Privacy Protection Act (COPPA) and the Family Educational Rights and Privacy Act (FERPA) and the Pupil Rights and Privacy Protection Act. *The Dodd/Shelby Student Privacy Act* will compound administrative requirements on schools that have engaged in collaborative ventures with businesses that provide greater learning opportunities for children. We should reward schools for innovative collaborations with businesses, not obstruct them with the extensive administrative mandates proposed in the Dodd/Shelby amendment. NSBA has similar concerns with the *Graham/Tiahrt* amendment that would require written consent to any testing or treatment at school, including any surveys or analyses that the student might take. NSBA urges you to reject such provisions.

- **Pesticide Use in Schools**—NSBA urges you to reject the School Environment Protection Act of 2001 regarding pesticide use in schools. This provision, which was added to the Senate-passed version of H.R. 1, would create an unworkable program for the nation's school districts. The provision contains a one-size-fits-all answer to the issue of pesticide use in schools. It contains overly prescriptive requirements regarding notification policies and the posting of signs and would increase school district liability for any inadvertent lapses. Meanwhile, across the nation states have been active in the area by emphasizing better education and techniques for those who handle pesticides rather than requiring more paperwork. Additionally, the Senate provision would amount to a grossly under-funded federal mandate on local school districts. In recent congressional testimony, a Virginia school district estimated that it would have to hire additional staff to comply with the amendment and that it would cost between $350,000 - $450,000 per year for it to be in compliance. Additionally, some small school districts might forgo pesticide treatments so as not to deal with the prescriptive requirements of the legislation. Certainly, not using pesticides can pose serious health risks because rodents and other pests carry diseases.

  This amendment was added to the Senate-passed version of H.R. 1 after final passage of the bill. Additionally, no formal public hearings on this issue occurred until after the amendment was included in the bill. If it is later determined that more needs to be done in the area of school pesticide use, additional formal hearings and public discussions would be beneficial to remedy the issue in a sensible and cost efficient manner.

- **Rural Education Achievement Programs**—NSBA urges you to support the reauthorization of the Rural Education Flexibility and Assistance Program endorsed by both the Senate and House versions of the bill. Such increased flexibility will enable rural and small school districts to address their unique problems related to instructional delivery in a more efficient and effective manner. NSBA urges you to establish authorizations at a level that would adequately meet these critical needs.

- **21st Century Learning Centers**—Both the Senate and House versions of the bill would allow direct funding to community-based organizations and other public or private organizations, including private or religious schools or organizations. The current statutory language allows private entities, including religious organizations, to participate as *community partners*, but maintains accountability and civil rights safeguards by leaving the administration of programs to local school districts. Local school districts are being held accountable for the performance of its schools and must have the authority to determine what community-based programs are more likely to bring about the desired performance results consistent with their academic programs. NSBA urges you to reject these provisions and maintain current law.

- **Teacher Voluntary Early Retirement Incentives**—Although not specifically included in either the Senate or House bills, NSBA urges you to include the provisions of the Teacher Voluntary Early Retirement Incentive Act of 2001, H.R. 2558, in the final bill. As local school districts prepare for the new requirements of the reauthorized ESEA, they will need to build their capacity to assist their schools to significantly improve their performance relative to student achievement. In addition to establishing more rigorous standards, realigning curricula, improving instruction and conducting annual assessments, local school districts will need to realign their personnel resources. Many local school districts will be unable to implement the major education reforms necessary without major realignment of their workforce. In many instances this will require volunteer early retirement incentives for teachers and other key personnel.

  Unfortunately, today, local school districts could be subject to litigation based on age discrimination if they offer certain early retirement incentives. Representatives Thomas Petri and Ron Kind have introduced legislation, H.R. 2558, to amend the Age Discrimination in Employment Act (ADEA) with respect to early retirement benefits. The bill would clarify that early retirement incentive plans based on age are lawful. Such incentives have proven to be beneficial to school districts in restructuring the workforce to accommodate emerging needs. Equally important, such incentives are already lawful in higher education institutions as a result of an amendment to ADEA passed by Congress in 1998.

As the conference negotiations proceed, NSBA welcomes the opportunity to offer additional comments. When the conference bill is completed, NSBA will formally submit its position relative to the bill.

If you have questions regarding our comments, please contact Reginald M. Felton, director of federal relations, at 703-838-6782, or e-mail refelton@nsba.org.

Sincerely,

Michael A. Resnick

Michael A. Resnick
Associate Executive Director

Vouchers

News Release

For Immediate Release
September 25, 2001

Contact: Renée Williams Hockaday
Phone: 703/838-6722
E-mail: press@nsba.org

U.S. Supreme Court Accepts Cleveland Voucher Case

NSBA Opposes Use of Public Tax Dollars for Private Schools

Alexandria, Va. – Sept 25 – The National School Boards Association (NSBA) today expressed dismay that the U.S. Supreme Court accepted the Cleveland voucher case.

"We believe steadfastly that vouchers are not only unconstitutional, but bad public policy and ultimately harm the education system this country has cherished, developed and nurtured for more than two centuries," said Anne Bryant, Executive Director of the National School Boards Association. "Today, more than any other time in our history, we need the unity inspired by public education and we need to focus our limited resources on our public schools."

NSBA will file an *amicus* brief in *Zelman v. Simmons-Harris* stressing its opinion that diverting public taxpayer money to private schools violates the First Amendment's separation of church and state principle. In addition, the brief will note that the work of educators will be made more difficult if public dollars are needlessly funneled away to private religious institutions.

"The 6th U.S. Circuit Court of Appeals was correct in its conclusion that vouchers violate the Establishment Clause," said NSBA General Counsel Julie Underwood. "I would hope and expect that the U.S. Supreme Court has accepted this case to declare once and for all that public education remains our nation's top priority."

NSBA notes that the high court has been known to draw a firm line on religion cases and that voucher supporters should be cautioned against premature celebration. In *Santa Fe v. Doe*, the court ruled that schools cannot sponsor organized prayer before high school football games.

In addition, a NSBA/Zogby International public opinion poll released today reveals that as many as 90 percent of Americans expect that when private schools accept vouchers they must likewise accept public accountability along with it.

The poll shows that U.S. citizens want voucher-recipient private schools (religious and non-religious) to meet the same accountability standards as the public schools. These standards include disclosing how they spend tax dollars; reporting student scores the same as the public schools do; having the same academic standards; and admitting any student who applies, regardless of abilities. Existing voucher programs routinely fail to meet these basic expectations.

-more-

The NSBA/Zogby poll also shows that 61 percent of all adults and 74 percent of African-Americans oppose vouchers for students who *already* attend private and religious schools.

Zogby International conducted the nationwide poll in telephone interviews with 1,211 adults. Complete poll results are available online at NSBA's Voucher Strategy Center web site (www.nsba.org/novouchers).

The National School Boards Association is a national federation of state and territorial school boards associations that represent more than 95,000 school board members who govern the nation's public schools. The organization's mission is to foster excellence and equity in public elementary and secondary education throughout the United States through local school board leadership.

# # #

Lyle Denniston
Supreme Court Correspondent,
The Boston Globe
Remarks prepared for 2001 Advocacy Seminar,
National School Board Association – Council of School Attorneys
Friday, October 26, 2001

Inside the Supreme Court: What Supreme Court Decisions Don't Necessarily Tell Us

The late Justice Potter Stewart once referred to court-following journalists like me as "strangers" to the proceedings – somewhat welcome, perhaps, but still outsiders. I think he was right about that. So you are entitled to be mildly skeptical about whether you are going to hear some genuinely inside stories about what is happening behind the scenes in the Marble Temple.

But maybe there is a sense in which we legal reporters can be thought to be "inside." As we approach the World Series, we could think about where the inside of home plate is: the side closest to the batter, of course. Treating the Supreme Court as the batter, I suppose that those of us who inhabit its press section might well be insiders; at least we get seats closest to the bench. And we do have some access to the Justices. In addition, we have lunch almost every day with one of the Court's officers. We also pay exceedingly close attention to the work of the Court, and the filings there, in a way that even some seasoned Supreme Court advocates don't have the time to do. It is probably true, then, that we do observe things that one can consider inside pitches.

I assure you that we **are** always watching and listening for those. In a way, perhaps, being a daily journalist in the halls of the Supreme Court may mean that we are acting out T.S. Eliot's famous lines:

> We shall not cease from exploration
> And the end of all our exploring
> Will be to arrive where we started
> And know the place for the first time.

Today I would like to try to help you "know the place" a little better, though perhaps not for the first time. If I do this well, I hope, it might help influence your advocacy before the Court, when you have the opportunity to take a case there. It might help, I suggest, because knowing how the Court does things internally – and, especially, knowing what agenda one or more Justices may be pursuing -- is something that frequent advocates there actively seek, and eagerly exploit.

Part of my assignment today is to talk to you about what can be learned about the Court from sources other than the Court's own decisions. But before I do that, let me make a pitch for keeping track of what the Court or the Justices do say publicly that will tell you, quite clearly, what is going on there beyond the individual cases.

It sometimes is possible to learn about a broader agenda that someone on the Court may be pursuing by listening to what a Justice says in public, perhaps even in an opinion. This is not inside information, but it is the kind of thing usually known only to those keeping a close watch.

Let me give you an example. Just the other day, the 5th Circuit in New Orleans announced a decision in the case of *USA v. Emerson*. That is a case about the Second Amendment – the one that the National Rifle Association reads as giving every American a private right to "keep and bear arms." Now that the 5th Circuit has ruled, one can speculate about whether the Supreme Court would hear any appeal arising from that case. Ordinarily, you would think not: the Court last ruled on the meaning of the Second Amendment in 1939 – yes, 1939 – and as recently as last Term it refused to hear a case testing the meaning of the Second Amendment. In recent years, it has repeatedly denied review of such cases.

But, wait a minute: Justice Clarence Thomas, in a concurring opinion in the case of *Printz v. U.S.* four years ago (June 1997), suggested that perhaps the time had come for the Court to revisit the Second Amendment's meaning. And now that the 5th Circuit has decided that an individual **does** have a private right to possess a firearm, there is clearly a conflict in the Circuits, and that might be Justice Thomas' signal. Anyway, it is a fair bet that someone will at least try to get a case before the Court on that issue, and soon.

And let me give you another example of something very useful for advocates to know, and this, too, derives from public knowledge. It also involves an area of special interest to Justice Thomas. You had a panel debate on this topic yesterday, with Jay Worona, Jay Sekulow and Barry Lynn – the separation of church and state in public schools. It is clear that four of the Justices, with Thomas very much in the vanguard, want to cast aside the entire notion of the "pervasively sectarian" private school that is presumed to be ineligible for public financial or other aid. It is not yet clear that those four will pick up a fifth vote, but almost any case on public assistance to private schools will be a temptation to the Court as a vehicle for revisiting that concept. If there is a petition from the 4th Circuit case involving the Columbia Union College, for example, that could be the vehicle.

I should warn you of something else at this point, though. The chances that you can get any case before the Court are much diminished these days – unless, perhaps, it fits with someone's agenda. This is a Court that regularly decides somewhere between 75 and 80 cases, on plenary review, every Term. Twenty years ago, the Court was hearing 150 or more cases a Term; the recent experience is thus a 50 percent reduction from that. We don't know for certain why it is happening; there are lots of speculative suggestions, but none is authoritative.

This is all the more reason to pick one's cases with utmost care, and to look for agendas that might give you an opening. Again, an example: if there is a case with a **federalism** angle, it probably has a fair chance of attracting the Court's interest, and perhaps even a grant. Just the other day, the Court granted review in a case testing states' 11th Amendment immunity to being charged by private parties before the Federal Maritime Commission – a case with enormous potential for expanding the state sovereignty revolution at the Court. There is no split in the Circuits on application of the 11th Amendment to administrative agencies, and thus, in that case, the Solicitor General urged the Court not to review the Maritime Commission's petition challenging a 4th Circuit decision upholding state immunity. But the Court agreed, anyway, to hear it. State sovereignty, obviously, is one of the hottest concepts on the Court's docket, and has been since about 1990.

In fact, it has been high on Chief Justice William Rehnquist's agenda for a quarter-century, even before he became the chief justice. He now has a clearcut 5-4 majority sharing that interest.

Again, though, a word to the wise: even a case in an area that is of keen interest to the Court is by no means a sure thing. Take another topic that you will be hearing about at this seminar – the voucher and school choice issue that comes up in a panel right after this session. The Cleveland case that the Court agreed in September to hear is the fifth case on the school choice issue to reach the Court in recent years, but the first one to get granted. In that area, the Court has been awaiting what it thought might be a really "clean" case, unencumbered by any side issues or complications. Given how few cases the Court does agree to hear, it is most reluctant to grant a case and then have it wash out for technical or procedural reasons.

That probably explains, also, why the Court has not yet granted a case on another topic in which we know some of the Justices have a lively interest. That is the question of using race as a determinative factor in admissions to public education – at any level, from the college on down. The Court showed its interest in that general subject – in a statutory context – when it took on the Piscataway case, only to have it snatched away by a settlement brokered by the civil rights community. It has had other opportunities, but it has passed them up: it has twice refused to hear the Hopwood case from Texas, it declined to hear the Smith case from Washington State, it similarly declined to review the Montgomery County and Arlington County public school cases, and it refused to hear the lab school case from California. What is going on here?

The reality is that every one of those cases had something about it that made it less than cert-worthy, and the denial of review in each was quite predictable. The same fate, I would predict, awaits the University of Georgia case, if the university opts to seek cert. The Court, it seems obvious, is waiting for a nearly ideal case. It could be that the University of Michigan cases, which were argued in the 6th Circuit just this week, may fit that description. We will see.

But perhaps you have come to hear more inside stuff, because that was promised by the published title of these remarks. Let me move to that, but I want to begin with a cautionary note.

Very seldom does someone like me, or any other observer not immediately employed in the chambers of a Justice, come upon hard evidence of something that is truly secret, something from deep inside the Court. Internal documents seldom "leak" from the Court, and Justices and their clerks seldom provide verbal "leaks" to the media. Later on in my remarks, I will tell you a story based on hard evidence from deep inside. But that is the exception, and I will leave it for later.

What inside stories about the Supreme Court are made of, principally, are a few details drawn from what is known publicly (though perhaps escaping the notice of all but the most attentive court observer), plus some subtle hints that emerge from the Court into the press room, and then a good deal of surmise – informed, but surmise nonetheless – overlaying the inside facts and the hints.

Let me illustrate the phenomenon with a story about a fairly recent decision that you may have heard about: *Bush versus Gore.* This is what can pass for an inside secret. I note in passing that I have now read 15 books on that decision, and in not one of those 15 have I been told this story. Here it is:

Perhaps you recall that the final decision came down on a Tuesday night – last December 12. And you no doubt recall that the ultimate ruling was based upon a perceived violation of equal protection, because of the varying standards used in vote recounts in Florida. But I would like to take you back to Monday night, December 11 last. The Court was within moments, literally, of deciding the case that night. Indeed, as early evening approached, the signs accumulated inside the courthouse that a decision was on its way. Then, suddenly, at about 7 p.m., the whole process stopped. The Court shut down for the night; the decision was not to come until 10 p.m. the next night, Tuesday.

What happened? There is good reason to believe that the Court was going to reverse the Florida Supreme Court on an entirely different ground than the one a majority ultimately embraced. I suggest that it was ready to rule that the Florida Supreme Court had violated Article II, Section 1, by using the state constitution to trump the acts of the state legislature. That was what had troubled some of the Justices the first time the controversy was under review at the Court. And that, of course, was ultimately the rationale that three

Justices, led by the Chief Justice, preferred when the case was finally resolved. But that approach lost its majority Monday night – after the Court learned, that evening, that the Florida Supreme Court had abandoned any reliance on the state constitution. Justices O'Connor and Kennedy were then no longer willing to chastise the Florida Supreme Court for its interpretation of Florida law as it bore upon a presidential election. Their federalist instincts had made them uncomfortable with that prospect, anyway. One conclusion suggests itself, at least tentatively: all of the criticism of the Court majority, for supposedly abandoning its federalist sensitivity just because it wanted George Bush to be president, may well be entirely mistaken. O'Connor and Kennedy moved to an alternative argument, in part, perhaps, to salvage some "face" for the Florida Supreme Court. Another suggestion might be read into this, and it could be of help in litigating before the Court: an advocate should continue to press all of the arguments that help the client; one never can know when an argument that seemed weak will capture a majority.

It is very clear that this is a very nimble Court, quite capable of changing its mind or its approach as it deliberates on a case. While we are all familiar with the customary 5-4 division of these Justices on important, and highly visible, cases, seasoned observers also know that it is not truly a predictable Court. The centrist habits of O'Connor and Kennedy have made for some real surprises, and no doubt will do so again. Of all the groups of nine Justices I have covered over some four decades, this group now sitting is the one that is the most intellectually gifted, and that quality makes it quite capable of developing new visions of the law, breaking out of the tried and true. The less-gifted assemblages of nine that I have covered were far easier to predict. In some ways, the present is one of the more exciting times in history to be an advocate before the Court.

All of what I have been telling you, so far, is the kind of observeration that any close court-watcher would pick up. I would argue that this is not just a parlor game for legal journalists or court aficionados to play. This is the way to watch the Court attentively, to look for signs that will aid in developing litigating strategy.

There are some occurrences, though, that develop so far inside the Court that one seldom hears about them. This is the kind of inside stuff that journalists would love to know about and to share with reade or listeners. The Court's decision in *Bush v. Gore* has led to a recent example of this phenomenon. Some three months after that ruling, Linda Greenhouse of *The New York Times* did a post-mortem on the decision, and, to this day, after all of the books about the case have come out, Linda's story remains the most authoritative. She provided a step-by-step account of how the Court made up its mind. One of the reasons that is was so solid, by the way, is that it came directly from several of the Justices – a truly rare occurrence. It does not detract anything from the quality of Linda's work, however, to note the time lapse between the decision and her story: after three months, even the Justices might talk, at least to some journalists.

I have an inside story for you. And, sharing it with you in the context of an advocacy seminar, I will provide the story along with a moral about it, a moral for litigators. Let me give you the moral first, then the story: it is important for lawyers who do or may practice before the Court to keep an eye on everything it does, not just what is happening in the area of the law in which they or their client might be interested. The Court does not see each case in isolation, even though the decisions that emerge sometimes look as if each is a disembodied entity, standing alone. The Court sometimes sees interrelationships in the strangest places, and they can make a difference, as they did in this instance.

Here's the story, and it comes from internal Court documents. Those documents, I will quickly add, are public now: they are in the Thurgood Marshall Papers in the Manuscript Division of the Library of Congress. Those Papers, by the way, are a treasure trove, not just of inside stories, but of case records that reveal in full how the Court's deliberative process actually works. Advocates can learn a lot about them.

This story goes back to the time when the Court was deliberating in private over two cases in 1973. One of them is very likely familiar to school attorneys: *San Antonio School District v. Rodriguez*. The other is probably familiar at least to the feminists in our audience: *Frontiero v. Richardson*. You may remember that, in the *Frontiero* decision, four Justices – one short of a majority – concluded that gender discrimination should be judged by the same constitutional standard as race discrimination: strict scrutiny. But what you may not know is that the idea was helped along considerably, within the Court, by a debate that was being waged over the *San Antonio* case.

Justice Lewis Powell's draft opinion in the *San Antonio* school financing case had discussed the two standards the Court then followed in judging equal protection claims (the intermediate standard had not fully emerged by that time; it would be developed later, in the field of gender discrimination). In response to the Powell draft, Justice Potter Stewart circulated a memo to the Conference, suggesting that the Court should simplify equal protection doctrine. In a passing comment, he noted that "some few classifications are suspect." He mentioned race, but, in an aside, he said "and perhaps sex."

Justice William Brennan, who was preparing a draft in the *Frontiero* case at the same time, saw an opening. In a cover note with his draft, he referred to Stewart's equal protection memo in the *San Antonio* case, and remarked: "I do feel that this case [*Frontiero*] would provide an appropriate vehicle to recognize sex as a 'suspect criterion.'" And the rest, you know, is history.

But there is a little more to the story. The lawyer who had advocated the strict scrutiny standard in *Frontiero* was Ruth Bader Ginsburg. Now, in the wake of **Justice** Ginsburg's opinion in the Virginia Military Institute case, we know that she regards the holding in that case – that gender classification must have an "exceedingly persuasive justification" – to be the near-equivalent of strict scrutiny for suspect classifications. That, at least, is what she has told insiders.

We don't come across such internal documents very often. In fact, the public release of the Marshall Papers deeply upset many members of the Court, and we are not likely to see a similar release again soon. We will have to depend, I suppose, more on surmise than on true revelation.

And with that, I will close, and ask if you have any questions.

EA 031561

U.S. Department of Education
Office of Educational Research and Improvement (OERI)
National Library of Education (NLE)
Educational Resources Information Center (ERIC)

ERIC®

REPRODUCTION RELEASE

(Specific Document)

I. DOCUMENT IDENTIFICATION:

Title: 2001 Advocacy Seminar Course Notebook

Author(s): Various

Corporate Source: NSBA Council of School Attorneys

Publication Date: 10/01

II. REPRODUCTION RELEASE:

In order to disseminate as widely as possible timely and significant materials of interest to the educational community, documents announced in the monthly abstract journal of the ERIC system, *Resources in Education* (RIE), are usually made available to users in microfiche, reproduced paper copy, and electronic media, and sold through the ERIC Document Reproduction Service (EDRS). Credit is given to the source of each document, and, if reproduction release is granted, one of the following notices is affixed to the document.

If permission is granted to reproduce and disseminate the identified document, please CHECK ONE of the following three options and sign at the bottom of the page.

The sample sticker shown below will be affixed to all Level 1 documents	The sample sticker shown below will be affixed to all Level 2A documents	The sample sticker shown below will be affixed to all Level 2B documents
PERMISSION TO REPRODUCE AND DISSEMINATE THIS MATERIAL HAS BEEN GRANTED BY Sample TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC) 1	PERMISSION TO REPRODUCE AND DISSEMINATE THIS MATERIAL IN MICROFICHE, AND IN ELECTRONIC MEDIA FOR ERIC COLLECTION SUBSCRIBERS ONLY, HAS BEEN GRANTED BY Sample TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC) 2A	PERMISSION TO REPRODUCE AND DISSEMINATE THIS MATERIAL IN MICROFICHE ONLY HAS BEEN GRANTED BY Sample TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC) 2B
Level 1 ↑ ☐	Level 2A ↑ ☐	Level 2B ↑ ☒
Check here for Level 1 release, permitting reproduction and dissemination in microfiche or other ERIC archival media (e.g., electronic) *and* paper copy.	Check here for Level 2A release, permitting reproduction and dissemination in microfiche and in electronic media for ERIC archival collection subscribers only	Check here for Level 2B release, permitting reproduction and dissemination in microfiche only

Documents will be processed as indicated provided reproduction quality permits.
If permission to reproduce is granted, but no box is checked, documents will be processed at Level 1.

I hereby grant to the Educational Resources Information Center (ERIC) nonexclusive permission to reproduce and disseminate this document as indicated above. Reproduction from the ERIC microfiche or electronic media by persons other than ERIC employees and its system contractors requires permission from the copyright holder. Exception is made for non-profit reproduction by libraries and other service agencies to satisfy information needs of educators in response to discrete inquiries.

Sign here,→ please

Signature: Andrews

Printed Name/Position/Title: Lyndsay Andrews Manager COSA

Organization/Address: NSBA
1680 Duke St. Alexandria, VA 22314

Telephone: 703/838-6738

FAX: 703/548-5613

E-Mail Address: landrews@nsba.org

Date: 12/10/01

(over)

III. DOCUMENT AVAILABILITY INFORMATION (FROM NON-ERIC SOURCE):

If permission to reproduce is not granted to ERIC, *or*, if you wish ERIC to cite the availability of the document from another source, please provide the following information regarding the availability of the document. (ERIC will not announce a document unless it is publicly available, and a dependable source can be specified. Contributors should also be aware that ERIC selection criteria are significantly more stringent for documents that cannot be made available through EDRS.)

Publisher/Distributor:
Address:
Price:

IV. REFERRAL OF ERIC TO COPYRIGHT/REPRODUCTION RIGHTS HOLDER:

If the right to grant this reproduction release is held by someone other than the addressee, please provide the appropriate name and address:

Name:
Address:

V. WHERE TO SEND THIS FORM:

Send this form to the following ERIC Clearinghouse:	ERIC Clearinghouse on Educational Management ~~1787 Agate Street~~ 5207 University of Oregon Eugene, OR 97403-5207 Attn: Acquisitions

However, if solicited by the ERIC Facility, or if making an unsolicited contribution to ERIC, return this form (and the document being contributed) to:

ERIC Processing and Reference Facility
4483-A Forbes Boulevard
Lanham, Maryland 20706

Telephone: 301-552-4200
Toll Free: 800-799-3742
FAX: 301-552-4700
e-mail: ericfac@inet.ed.gov
WWW: http://ericfac.piccard.csc.com

EFF-088 (Rev. 2/2000)